32 Am. Jur. 2d Federal Courts Summary

American Jurisprudence, Second Edition | May 2021 Update

Federal Courts
George L. Blum, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; John Glenn, J.D.; Noah J. Gordon, J.D.; Lonnie E. Griffith, Jr., J.D.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Janice Holben, J.D.; John Kimpflen, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Eric C. Surette, J.D.

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Summary

Scope:
This article deals with the organization, nature, and powers of the federal judicial system, as well as federal judges, magistrate judges, court records and reports, attorneys appearing in federal courts, and disqualification of judges. Also treated in this article are rules of procedure and rules of decision, and particular courts such as the United States district courts, the United States courts of appeals, United States Supreme Court, the United States Court of Federal Claims, and courts of United States territories and possessions. The article also discusses particular proceedings such as class actions, multidistrict litigation, and proceedings in forma pauperis.

Federal Aspects:
This article discusses constitutional provisions and federal statutes dealing with the Supreme Court of the United States, the courts of appeals, the district courts, and the Court of Federal Claims, as well as various other inferior courts created under the Constitution or by Congress. The discussion includes the powers and duties of federal courts; jurisdiction (federal question and diversity), venue, and the removal of actions; court administration and the business of the courts; practice, procedure, and proceedings before federal courts; judges; abstention by federal courts; and class actions. This article also discusses the Federal Rules of Civil Procedure.

Treated Elsewhere:
Court of International Trade, see Am. Jur. 2d, Customs and Import Regulations §§ 1 et seq.

Courts-martial, see Am. Jur. 2d, Military and Civil Defense §§ 208 to 321

District of Columbia judicial system, including the jurisdiction of the United States district court and the United States Court of Appeals for the District of Columbia, see Am. Jur. 2d, District of Columbia §§ 17 to 27

Federal Rules of Evidence, see Am. Jur. 2d, Evidence §§ 1 et seq.

Injunctions, generally, see Am. Jur. 2d, Injunctions §§ 1 et seq.

Jurisdiction of, and practice and procedure before, federal courts in particular types of proceedings, see Am. Jur. 2d, Admiralty §§ 115 to 210; Am. Jur. 2d, Aliens and Citizens §§ 1 et seq. (immigration, naturalization, and deportation proceedings); Am. Jur. 2d, Alternative Dispute Resolution §§ 1 et seq. (arbitration proceedings, stay of judicial proceedings pending arbitration, and enforcement of arbitration awards); Am. Jur. 2d, Ambassadors, Diplomats, and Consular Officials §§

17 to 27 (cases involving ambassadors and consuls); Am. Jur. 2d, Bankruptcy §§ 1 et seq.; Am. Jur. 2d, Banks and Financial Institutions §§ 1 et seq. (actions or proceedings against national banks); Am. Jur. 2d, Bonds §§ 1 et seq. (actions on bonds executed under federal laws); Am. Jur. 2d, Carriers §§ 1 et seq. (determinations and orders of the Surface Transportation Board); Am. Jur. 2d, Civil Rights §§ 1 et seq. (actions under civil rights statutes); Am. Jur. 2d, Copyright and Literary Property §§ 234 to 290; Am. Jur. 2d, Customs Duties and Import Regulations §§ 1 et seq.; Am. Jur. 2d, Declaratory Judgments §§ 186 to 199 (actions under the Federal Declaratory Judgment Act); Am. Jur. 2d, Ejectment §§ 1 et seq.; Am. Jur. 2d, Elections §§ 1 et seq. (disputes involving the right to vote); Am. Jur. 2d, Eminent Domain §§ 1 et seq.; Am. Jur. 2d, Federal Employers' Liability and Compensation Acts §§ 1 et seq.; Am. Jur. 2d, Federal Tax Enforcement §§ 603 to 932; Am. Jur. 2d, Federal Tort Claims Act §§ 1 et seq.; Am. Jur. 2d, Forfeitures and Penalties §§ 1 et seq.; Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 1 et seq.; Am. Jur. 2d, Injunctions §§ 1 et seq.; Am. Jur. 2d, Interpleader §§ 1 et seq. (cases under federal interpleader statute); Am. Jur. 2d, Labor and Labor Relations §§ 1 et seq.; Am. Jur. 2d, Mandamus §§ 1 et seq.; Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1 et seq.; Am. Jur. 2d, Patents §§ 733 to 880; Am. Jur. 2d, Post Office §§ 85 to 92 (cases under postal laws of United States); Am. Jur. 2d, Prohibition §§ 1 et seq.; Am. Jur. 2d, Quo Warranto §§ 1 et seq.; Am. Jur. 2d, Receivers §§ 1 et seq.; Am. Jur. 2d, Securities Regulation—Federal §§ 1 et seq.; Am. Jur. 2d, Trademarks and Tradenames §§ 142 to 156

Relationship between federal and state courts, including the effect of state court decisions in federal courts and vice versa, see Am. Jur. 2d, Courts §§ 1 et seq.

Service of process, see Am. Jur. 2d, Process §§ 91 to 129

State court judges, see Am. Jur. 2d, Judges §§ 1 et seq.

Trial procedure, generally, see Am. Jur. 2d, Trial §§ 1 et seq.

United States Tax Court, see Am. Jur. 2d, Federal Taxation §§ 1 et seq.

Venue of criminal cases in federal courts, see Am. Jur. 2d, Criminal Law §§ 455, 456

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I. Federal Judicial System

A. Federal Courts in General

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Research References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2003 to 2005, 2013, 2016 to 2018

A.L.R. Library

A.L.R. Index, Claims Court
A.L.R. Index, Congress
A.L.R. Index, Court of International Trade
A.L.R. Index, Courts
A.L.R. Index, District Courts
A.L.R. Index, Jurisdiction
A.L.R. Index, States
A.L.R. Index, Supreme Court of United States
A.L.R. Index, Tax Court
West's A.L.R. Digest, Federal Courts 2003 to 2005, 2013, 2016 to 2018

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I. Federal Judicial System

A. Federal Courts in General

§ 1. Constitutional courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2003, 2005

Treatises and Practice Aids

Wright and Miller et al., Federal Practice and Procedure, Jurisdiction and Related Matters § 3528 (3d ed.)

The United States Constitution vests the judicial power of the United States in one Supreme Court of the United States and such inferior courts as Congress may establish.[1]

Observation:

Generally, a congressional declaration that a particular court is an Article III court and that its judges are entitled to the protections of Article III is sufficient, so long as the functions of that court fit harmoniously into the federal judicial system authorized by Article III.[2]

Among the constitutional courts are the district courts of the United States,[3] including the United States District Court in

Puerto Rico,[4] the United States courts of appeals,[5] the United States Supreme Court,[6] the Court of International Trade,[7] and the District of Columbia courts having jurisdiction over cases arising under federal statutes of nationwide application,[8] such as the United States District Court for the District of Columbia.[9]

Footnotes

1 U.S. Const. Art. III, § 1.

2 Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962).

3 Mookini v. U.S., 303 U.S. 201, 58 S. Ct. 543, 82 L. Ed. 748 (1938).

4 28 U.S.C.A. § 119.

5 Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U.S. 716, 49 S. Ct. 499, 73 L. Ed. 918 (1929).

6 28 U.S.C.A. §§ 1 to 6.

7 28 U.S.C.A. § 251(a).

8 O'Donoghue v. U.S., 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933).

9 28 U.S.C.A. § 88.

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I. Federal Judicial System

A. Federal Courts in General

§ 2. Legislative courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2003, 2005

Treatises and Practice Aids

Wright and Miller et al., Federal Practice and Procedure, Jurisdiction and Related Matters § 3528 (3d ed.)

Not all federal cases heard by federal courts need be heard by constitutional courts, that is, courts created by Congress under Article III of the Constitution.[1] Article III does not express the full authority of Congress to create courts,[2] and Article III does not confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court.[3] Constitutional provisions outside Article III invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution.[4]

Courts established by Congress in the exercise of powers outside Article III are called legislative courts.[5] Legislative courts do indeed exercise judicial power, as distinguished from legislative, executive, or administrative power.[6] However, legislative courts have functions directed to the execution of powers independent of Article III, § 2, and their judges hold office for such terms as Congress prescribes, whether for a fixed period of years or during good behavior.[7] Judicial power apart from that conferred by Article III of the Constitution can be conferred on either legislative or constitutional courts.[8] Moreover, judges of Article I courts may be given the power to appoint special trial judges.[9]

Article III serves a structural purpose, barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other.[10] Thus, Congress cannot empower non-Article III judges to act with the full "judicial Power of the United States."[11] The constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III, and such inquiry is guided by the principle that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.[12]

Congress's power to create adjuncts to Article III courts and assign them limited adjudicatory functions is in no sense an "exception" to Article III.[13] Rather, such an assignment is consistent with Article III, so long as "the essential attributes of the judicial power" are retained in the Article III court, and so long as Congress's adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights.[14]

Through the years, Congress has created a number of legislative courts, including strictly local courts of the District of Columbia;[15] territorial courts;[16] consular courts established by concessions from foreign countries;[17] the United States Tax Court;[18] courts-martial;[19] and the United States Court in Indian Territory.[20] The Court of Claims was an Article III court,[21] but the United States Court of Federal Claims, which assumed its trial jurisdiction, is an Article I court.[22] Bankruptcy judges are Article I judges,[23] and the initial allocation in the Bankruptcy Reform Act of 1978[24] of extensive jurisdiction to the bankruptcy judges was held to violate Article III.[25]

Footnotes

1 Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

2 Ex parte Bakelite Corporation, 279 U.S. 438, 49 S. Ct. 411, 73 L. Ed. 789 (Cust. App. 1929).

3 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

4 Ex parte Bakelite Corporation, 279 U.S. 438, 49 S. Ct. 411, 73 L. Ed. 789 (Cust. App. 1929).

5 Ex parte Bakelite Corporation, 279 U.S. 438, 49 S. Ct. 411, 73 L. Ed. 789 (Cust. App. 1929).

6 Williams v. U.S., 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933).

7 Ex parte Bakelite Corporation, 279 U.S. 438, 49 S. Ct. 411, 73 L. Ed. 789 (Cust. App. 1929).

8 Williams v. U.S., 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933).

9 Freytag v. C.I.R., 501 U.S. 868, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991).

10 Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015).

11 In re Federated Dept. Stores, Inc., 328 F.3d 829, 2003 FED App. 0139P (6th Cir. 2003).

12 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

13 Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

14 Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

15 Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

16 Williams v. U.S., 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933); O'Donoghue v. U.S., 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933).
Congress has Article I legislative authority to give only limited tenure for judges in the territorial courts. U.S. v. Canel, 708 F.2d 894 (3d Cir. 1983).

17 Ex parte Bakelite Corporation, 279 U.S. 438, 49 S. Ct. 411, 73 L. Ed. 789 (Cust. App. 1929).

18 26 U.S.C.A. § 7441.

19 Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

20 Sand Springs Home v. Title Guarantee & Trust Co., 16 F.2d 917 (C.C.A. 8th Cir. 1926).

21 Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962).

22 28 U.S.C.A. § 171.
As to the United States Court of Federal Claims, generally, see §§ 1851 to 2150.

23 In re Franklin Computer Corp., 60 B.R. 795 (Bankr. E.D. Pa. 1986).

24 Pub. L. No. 95-598.

25 Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982).

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I. Federal Judicial System

A. Federal Courts in General

§ 3. Establishment of lower federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2003, 2004

Treatises and Practice Aids

Wright and Miller et al., Federal Practice and Procedure, Jurisdiction and Related Matters §§ 3502, 3503 (3d ed.)

The Constitution vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish.[1] Under this provision, Congress may or may not establish lower federal courts, as it sees fit.[2] Congress can constitutionally decline to create any lower federal courts, leaving suitors to the remedies afforded by state courts with such appellate review by the Supreme Court as Congress may prescribe.[3]

Of course, Congress created a lower federal court system in the First Judiciary Act, enacted in 1789,[4] but it has never provided that all federal cases be heard by federal courts. Very early in this country's history, Congress left the enforcement of selected federal criminal laws to state courts.[5] The lower federal courts did not have general federal question jurisdiction until 1875, thus leaving state courts as the only forum for vindicating many important federal claims.[6] For the most part, state courts retain concurrent jurisdiction of federal claims properly within the jurisdiction of lower federal courts.[7] In order to give the federal courts exclusive jurisdiction over a federal cause of action, Congress must affirmatively divest state courts of their presumptively concurrent jurisdiction.[8]

Footnotes

[1] U.S. Const. Art. III, § 1.

[2] Lockerty v. Phillips, 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943).

[3] Lockerty v. Phillips, 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943).

[4] 1 Stat. 73.

[5] Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

[6] Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).
As to federal question jurisdiction, generally, see §§ 836 to 1002.

[7] Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962).

[8] Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990).

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I. Federal Judicial System

A. Federal Courts in General

§ 4. Congressional authority over federal court jurisdiction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013, 2016 to 2018

Treatises and Practice Aids

Wright and Miller et al., Federal Practice and Procedure, Jurisdiction and Related Matters §§ 3525 to 3527 (3d ed.)

The terms of Article III of the Constitution, which vest the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, directly confer jurisdiction on only one court—the Supreme Court.[1] Every other federal court derives its jurisdiction wholly from Congress.[2] The provisions of Article III defining the judicial power of the United States do not vest jurisdiction in the lower federal courts over the designated cases and controversies, but rather delimit the types of cases over which Congress may confer jurisdiction in the courts it chooses to create.[3] The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires a congressional act to confer it.[4] Thus, federal courts are courts of limited jurisdiction and possess only that power authorized by the Federal Constitution and federal statute.[5] Court-prescribed rules of practice and procedure for cases in federal district courts and courts of appeals do not create or withdraw federal jurisdiction.[6]

Only Congress may determine a lower federal court's subject matter jurisdiction,[7] and the jurisdiction of federal courts is not to be expanded by judicial decree.[8] Thus, courts do not establish the boundaries of their jurisdiction for themselves; rather, Congress puts up the fences.[9] Once Congress defines the jurisdiction of the lower federal courts, the limits upon federal jurisdiction must be neither disregarded nor evaded.[10]

Congressional authority includes the power of investing inferior federal courts with jurisdiction either limited, concurrent, or

exclusive, and of withholding jurisdiction from the in the exact degrees and character to which Congress may seem proper for the public good.[11] Thus, Congress may, in its discretion, grant, withhold,[12] define, and limit the jurisdiction of the inferior courts of the United States.[13] For example, Congress has the prerogative to restrict the subject matter jurisdiction of federal district courts based on the types of claims brought by particular plaintiffs.[14] Also, Congress may expressly divest the district courts of jurisdiction over certain claims, and impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court.[15]

Although Congress may vest in the lower federal courts full power to hear all cases to which the federal judicial power extends under the Constitution, it is not required to do so,[16] and may circumscribe the jurisdiction of the federal courts more narrowly than required by the United States Constitution.[17] It may withhold equity jurisdiction or withhold jurisdiction to enjoin certain conduct, although the federal courts will avoid a construction of a statute which would deny all opportunity for judicial determination of an asserted constitutional right.[18] Congress may confer original or appellate jurisdiction,[19] make judgments unreviewable,[20] restrict settlement of controversies to nonjudicial agencies,[21] and provide for judicial review of the decisions of boards or commissions.[22] The only limitation is that Congress may not grant jurisdiction beyond the constitutional boundaries,[23] so, for example, Congress cannot confer jurisdiction upon inferior courts to hear state law claims between citizens of the same state.[24] Jurisdiction, having been conferred, may at the will of Congress be taken away in whole or in part, and, if withdrawn without a saving clause, all pending cases, although cognizable when commenced, must fall.[25]

Although Congress has the power, within constitutional limits, to tell the courts what classes of cases they may decide[26] and determine when, and under what conditions, federal courts can hear such cases,[27] Congress may not prescribe or superintend how courts decide those cases.[28]

Because only Congress may determine a lower federal court's subject matter jurisdiction, an administrative regulation may not confer jurisdiction where Congress has not done so.[29]

Practice Tip:

It is to be presumed that a cause lies outside the limited jurisdiction of federal courts and the burden of establishing the contrary rests on the party asserting jurisdiction.[30]

CUMULATIVE SUPPLEMENT

Cases:

Congress' greater power to create lower federal courts includes its lesser power to limit the jurisdiction of those courts. (Per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment). U.S.C.A. Const. Art. 1, § 8, cl. 1 et seq.; U.S.C.A. Const. Art. 3, § 1. Patchak v. Zinke, 138 S. Ct. 897 (2018).

So long as Congress does not violate other constitutional provisions, its control over the jurisdiction of the federal courts is plenary. (Per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment). U.S.C.A. Const. Art. 1, § 8, cl. 1 et seq.; U.S.C.A. Const. Art. 3, § 1. Patchak v. Zinke, 138 S. Ct. 897 (2018).

Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases. (Per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment). U.S.C.A. Const. Art. 3, § 1 et seq. Patchak v. Zinke, 138 S. Ct. 897 (2018).

Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power. (Per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment). U.S.C.A. Const. Art. 3, § 1 et seq. Patchak v. Zinke, 138 S. Ct. 897 (2018).

Jurisdiction is governed by the intent of Congress and not by any views the Supreme Court may have about sound policy. National Ass'n of Mfrs. v. Department of Defense, 138 S. Ct. 617 (2018).

Only Congress may determine a lower federal court's subject-matter jurisdiction, and accordingly, a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time. U.S.C.A. Const. Art. 3, § 1 et seq. Hamer v. Neighborhood Housing Services of Chicago, 138 S. Ct. 13 (2017).

[END OF SUPPLEMENT]

Footnotes

[1] Kline v. Burke Const. Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922).

[2] Kline v. Burke Const. Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922).
The judicial power of federal district courts and courts of appeals depends entirely upon the action of Congress, who possesses the sole power of creating the tribunals inferior to the Supreme Court. Bowling v. Parker, 882 F. Supp. 2d 891 (E.D. Ky. 2012).
Article III, augmented by the necessary and proper clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and to establish procedural rules governing litigation in these courts. Burlington Northern R. Co. v. Woods, 480 U.S. 1, 107 S. Ct. 967, 94 L. Ed. 2d 1, 6 Fed. R. Serv. 3d 1035 (1987).

[3] Kline v. Burke Const. Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922).
A constitutional grant of federal judicial power is cast in terms of its reach or extent. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

[4] Kline v. Burke Const. Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922).
A federal court is not a general repository of judicial power but instead must satisfy itself that it has subject matter jurisdiction over a dispute before it addresses the merits of the claims. U.S. v. Robinson, 408 F. Supp. 2d 437 (E.D. Mich. 2005).

[5] Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391, 29 Fed. R. Serv. 3d 1 (1994).
Federal courts are courts of limited jurisdiction, with the ability to hear only cases entrusted to them by a grant of power contained either in the Constitution or in an Act of Congress. Shade v. U.S. Congress, 942 F. Supp. 2d 43 (D.D.C. 2013), aff'd, 2013 WL 5975978 (D.C. Cir. 2013).

[6] Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004).
The Federal Rules of Civil Procedure are not a statute, and they do not create or withdraw federal jurisdiction. Administrative Subpoena Walgreen Co. v. U.S. Drug Enforcement Admin., 913 F. Supp. 2d 243 (E.D. Va. 2012).

[7] Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004); Legg v. Ulster County, 820 F.3d 67 (2d Cir. 2016); Grynberg v. Kinder Morgan Energy Partners, L.P., 805 F.3d 901 (10th Cir. 2015), cert. denied, 136 S. Ct. 1714, 194 L. Ed. 2d 825 (2016); In re Trusted Net Media Holdings, LLC, 550 F.3d 1035 (11th Cir. 2008); Hager v. Federal Nat. Mortg. Ass'n, 882 F. Supp. 2d 107 (D.D.C. 2012); Harris v. Department of Homeland Sec., 18 F. Supp. 3d 1349 (S.D. Fla. 2014), as amended, (May 8, 2014); In re Andersen, 476 B.R. 668 (B.A.P. 1st Cir. 2012); In re Johnsson, 551 B.R. 384 (Bankr. N.D. Ill. 2016).

[8] Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391, 29 Fed. R. Serv. 3d 1 (1994).

9 M.L. Johnson Family Properties, LLC v. Jewell, 237 F. Supp. 3d 528 (E.D. Ky. 2017).

10 Sunshine Haven Nursing Operations, LLC v. U.S. Dept. of Health and Human Services, Centers for Medicare & Medicaid Services, 742 F.3d 1239 (10th Cir. 2014); PTA-FLA, Inc. v. ZTE USA, Inc., 844 F.3d 1299 (11th Cir. 2016).

11 Lockerty v. Phillips, 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943); Harris v. Socialist People's Libyan Arab Jamahiriya, 620 F. Supp. 2d 1 (D.D.C. 2009); Doral Bank v. Federal Deposit Ins. Co., 59 F. Supp. 3d 358 (D.P.R. 2014).
The Tax Injunction Act restricts the power of federal district courts to prevent collection or enforcement of state taxes. Arkansas v. Farm Credit Services of Cent. Arkansas, 520 U.S. 821, 117 S. Ct. 1776, 138 L. Ed. 2d 34 (1997).

12 Scottsdale Capital Advisors Corporation v. Financial Industry Regulatory Authority, Inc., 844 F.3d 414 (4th Cir. 2016), cert. denied, 137 S. Ct. 1838, 197 L. Ed. 2d 761 (2017).
Congress's authority to establish inferior courts includes the power to limit their jurisdiction and powers. People of Bikini o/b/o Kili/Bikini/Ejit Local and Government Council v. U.S., 554 F.3d 996 (Fed. Cir. 2009).

13 Firebird Structures, LCC v. United Brotherhood of Carpenters and Joiners of America, Local Union No. 1505, 2017 L.R.R.M. (BNA) 150925, 2017 WL 2222405 (D.N.M. 2017).

14 Bronner v. Duggan, 2017 WL 1208402 (D.D.C. 2017).

15 Bennett v. U.S. Securities and Exchange Commission, 844 F.3d 174 (4th Cir. 2016).

16 Carey v. E.I. duPont de Nemours & Co., 209 F. Supp. 2d 641 (M.D. La. 2002).

17 In re Charter Oak Associates, 361 F.3d 760 (2d Cir. 2004).

18 Lockerty v. Phillips, 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943).

19 Home Life Ins. Co. of Brooklyn v. Dunn, 86 U.S. 214, 22 L. Ed. 68, 1873 WL 15989 (1873).

20 Ex parte State of Pennsylvania, 109 U.S. 174, 3 S. Ct. 84, 27 L. Ed. 894 (1883).

21 Lehr v. U.S., 139 F.2d 919 (C.C.A. 5th Cir. 1943).

22 Stephens v. Cherokee Nation, 174 U.S. 445, 19 S. Ct. 722, 43 L. Ed. 1041 (1899).

23 Kline v. Burke Const. Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922); Hodgson v. Bowerbank, 9 U.S. 303, 3 L. Ed. 108, 1809 WL 1627 (1809); Garanti Finansal Kiralama A.S. v. Aqua Marine and Trading Inc., 697 F.3d 59 (2d Cir. 2012); Federal Home Loan Mortg. Corp. v. Shaffer, 72 F. Supp. 3d 1265 (N.D. Ala. 2014).

24 Carey v. E.I. duPont de Nemours & Co., 209 F. Supp. 2d 641 (M.D. La. 2002).
Congress lacks the power to confer jurisdiction on the federal courts over purely state claims. SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties LLC, 2002 WL 1905968 (S.D. N.Y. 2002).

25 Kline v. Burke Const. Co., 260 U.S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077 (1922).

26 City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); Gaines Motor Lines, Inc. v. Klaussner Furniture Industries, Inc., 734 F.3d 296 (4th Cir. 2013); Patchak v. Jewell, 828 F.3d 995 (D.C. Cir. 2016), cert. granted, 137 S. Ct. 2091, 197 L. Ed. 2d 893 (2017); Bombardier, Inc. v. United States Department of Labor, 145 F. Supp. 3d 21 (D.D.C. 2015).

27 Alphas Co., Inc. v. William H. Kopke, Jr., Inc., 708 F.3d 33 (1st Cir. 2013); Baker v. U.S., 670 F.3d 448, 81 Fed. R. Serv. 3d 721 (3d Cir. 2012); U.S. v. Spaulding, 802 F.3d 1110 (10th Cir. 2015); Doral Bank v. Federal Deposit Ins. Co., 59 F. Supp. 3d 358 (D.P.R. 2014).

28 City of Arlington, Tex. v. F.C.C., 569 U.S. 290, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); Patchak v. Jewell, 828 F.3d 995 (D.C. Cir. 2016), cert. granted, 137 S. Ct. 2091, 197 L. Ed. 2d 893 (2017).
It is improper for Congress to direct the judiciary to reach a particular result in a pending case, and Congress violates

the separation of powers doctrine when it presumes to dictate how the federal courts should decide an issue of fact under threat of loss of jurisdiction. Seattle Audubon Soc. v. Robertson, 914 F.2d 1311 (9th Cir. 1990), judgment rev'd on other grounds, 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992).

[29] Yu-Ling Teng v. District Director, U.S. Citizenship and Immigration Services, 820 F.3d 1106 (9th Cir. 2016).

[30] Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391, 29 Fed. R. Serv. 3d 1 (1994).

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32 Am. Jur. 2d Federal Courts § 5

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Federal Courts
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I. Federal Judicial System

A. Federal Courts in General

§ 5. Congressional authority over federal court jurisdiction—Non-Article II court and public rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2016, 2018

There are several classes of cases that Congress can permissibly assign to non-Article III courts,[1] such as bankruptcy courts.[2] One such class includes cases involving public rights,[3] which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[4] The public rights doctrine allows Congress to remove consideration of certain matters from the judicial branch and to assign such consideration to legislative courts or administrative agencies.[5]

What makes a right "public" rather than private, for purposes of determining the ability of a non-Article III court to adjudicate it, is that the right is integrally related to particular federal government action.[6] Public rights cases include cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority.[7] Cases based on the Takings Clause fall into the public rights category,[8]

Congress may not, however, withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty.[9]

Footnotes

[1] Sammons v. United States, 860 F.3d 296 (5th Cir. 2017).
Congress may create non-Article III courts that finally adjudicate a matter only in three instances: territorial courts,

courts-martial, and courts that adjudicate cases involving public rights. In re Albertson, 535 B.R. 662 (S.D. W. Va. 2015).

[2] In re Linear Electric Company, Inc., 852 F.3d 313 (3d Cir. 2017).

[3] In re Linear Electric Company, Inc., 852 F.3d 313 (3d Cir. 2017); Sammons v. United States, 860 F.3d 296 (5th Cir. 2017).
Proceedings involving "public rights" are an exception to the principle that the Constitution generally reserves power to adjudicate common law claims to courts established under Article III. In re Strathmore Group, LLC, 522 B.R. 447 (Bankr. E.D. N.Y. 2014).

[4] Sammons v. United States, 860 F.3d 296 (5th Cir. 2017).

[5] Brott v. United States, 858 F.3d 425 (6th Cir. 2017).

[6] Reed v. Nathan, 558 B.R. 800 (E.D. Mich. 2016); Hamilton v. Try Us, LLC, 491 B.R. 561 (W.D. Mo. 2013); In re Rouette, 500 B.R. 670 (Bankr. D. Conn. 2013); In re Strathmore Group, LLC, 522 B.R. 447 (Bankr. E.D. N.Y. 2014).

[7] In re Linear Electric Company, Inc., 852 F.3d 313 (3d Cir. 2017).

[8] Sammons v. United States, 860 F.3d 296 (5th Cir. 2017).

[9] Stern v. Marshall, 564 U.S. 462, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011); In re Linear Electric Company, Inc., 852 F.3d 313 (3d Cir. 2017); Brott v. United States, 858 F.3d 425 (6th Cir. 2017); Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC, 490 B.R. 46 (S.D. N.Y. 2013); In re Freeway Foods of Greensboro, Inc., 466 B.R. 750 (Bankr. M.D. N.C. 2012).

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32 Am. Jur. 2d Federal Courts § 6

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I. Federal Judicial System

A. Federal Courts in General

§ 6. Interpretation of statutes granting jurisdiction to Article III courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2003

Interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.[1] Jurisdictional provisions in federal statutes are strictly construed,[2] and the Supreme Court has a deeply felt and traditional reluctance to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes.[3] When a statute creates jurisdiction in a federal court, courts must construe the statute with precision and with fidelity to the terms by which Congress has expressed its wishes.[4] If there is ambiguity as to whether a statute confers federal jurisdiction over a case, the court is compelled to adopt a reasonable, narrow construction,[5] with all doubts resolved against removal.[6] Where, however, Congress does not say there is a jurisdictional bar, there is none.[7]

If Congress clearly states that a threshold limitation on a statute's scope counts as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue,[8] but when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[9] There are no "magic words" Congress must use to express that a statutory requirement is jurisdictional.[10] Rather, to determine if a threshold limitation on a statute's scope is jurisdictional, courts examine the statute to determine if it speaks in jurisdictional terms or refers in any way to the jurisdiction of the courts, which requires courts to consider the text, context, and relevant historical treatment of the provision.[11] In examining statutory text to determine whether a threshold limitation on the statute's scope is jurisdictional, courts look at the plain language to determine if it speaks in jurisdictional terms, meaning whether it speaks to the power of the court rather than to the rights or obligations of the parties.[12] A statute will be ranked as jurisdictional absent an express designation only if the statutory limitation is of a type that the Supreme Court has long held does speak in jurisdictional terms even absent a jurisdictional label.[13]

CUMULATIVE SUPPLEMENT

Cases:

In cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, a rule is jurisdictional if Congress clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, but this is not to say that Congress must incant magic words in order to speak clearly. U.S.C.A. Const. Art. 3, § 1 et seq. Hamer v. Neighborhood Housing Services of Chicago, 138 S. Ct. 13 (2017).

[END OF SUPPLEMENT]

Footnotes

[1] Blue Water Navy Vietnam Veterans Association, Inc. v. McDonald, 82 F. Supp. 3d 443 (D.D.C. 2015), aff'd, 830 F.3d 570 (D.C. Cir. 2016).

[2] Grosvenor v. Qwest Corp., 733 F.3d 990 (10th Cir. 2013); Hernandez v. United States, 34 F. Supp. 3d 1168 (D. Colo. 2014); Bank of America, N.A. v. F.D.I.C., 908 F. Supp. 2d 60 (D.D.C. 2012); In re Any and all funds or other assets in Brown Brothers Harriman & Co. Account No. 8870792 in name of Tiger Eye Investments, Ltd., 601 F. Supp. 2d 252 (D.D.C. 2009), aff'd, 613 F.3d 1122 (D.C. Cir. 2010); U.S. ex rel. Ondis v. City of Woonsocket, R.I., 582 F. Supp. 2d 212 (D.R.I. 2008), aff'd, 587 F.3d 49 (1st Cir. 2009).
Statutes conferring jurisdiction upon the federal courts, and particularly removal statutes, are to be narrowly construed in light of the courts' constitutional role as limited tribunals. De La Rosa v. Reliable, Inc., 113 F. Supp. 3d 1135 (D.N.M. 2015).

[3] Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562, 194 L. Ed. 2d 671 (2016).

[4] U.S. v. Bond, 762 F.3d 255 (2d Cir. 2014); Xiaoyuan Ma v. Holder, 860 F. Supp. 2d 1048 (N.D. Cal. 2012).

[5] Pre-Paid Legal Services, Inc. v. Cahill, 786 F.3d 1287 (10th Cir. 2015), cert. denied, 136 S. Ct. 373, 193 L. Ed. 2d 292 (2015); Grosvenor v. Qwest Corp., 733 F.3d 990 (10th Cir. 2013).

[6] Ullman v. Safeway Ins. Co., 995 F. Supp. 2d 1196 (D.N.M. 2013).

[7] Santiago-Lugo v. Warden, 785 F.3d 467 (11th Cir. 2015).

[8] Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010); Hassen v. Government of Virgin Islands, 861 F.3d 108 (3d Cir. 2017); Group Against Smog and Pollution, Inc. v. Shenango Inc., 810 F.3d 116 (3d Cir. 2016); Shweika v. Department of Homeland Sec., 723 F.3d 710 (6th Cir. 2013); Huerta v. Ducote, 792 F.3d 144 (D.C. Cir. 2015).

[9] Netchem, Inc. v. U.S., 961 F. Supp. 2d 1336 (Ct. Int'l Trade 2014); Sebelius v. Auburn Regional Medical Center, 568 U.S. 145, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013); Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010) (holding, further, that a statutory condition that requires a party to take some action before filing a lawsuit should not be ranked as jurisdictional merely because it promotes important congressional objectives); Hassen v. Government of Virgin Islands, 861 F.3d 108 (3d Cir. 2017); U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294 (3d Cir. 2016); Goldfarb v. Mayor and City Council of Baltimore, 791 F.3d 500 (4th Cir. 2015); Louisiana Environmental Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012); Shweika v. Department of Homeland Sec., 723 F.3d 710 (6th Cir. 2013); Gray v. U.S., 723 F.3d 795 (7th Cir. 2013); Adkins v. VIM Recycling, Inc., 644 F.3d 483 (7th Cir. 2011); Gad v. Kansas State University, 787 F.3d 1032, 318 Ed. Law Rep. 625 (10th Cir. 2015); Malloy v. Association of State and Territorial Solid Waste Management Officials, 955 F. Supp. 2d 50 (D.D.C. 2013); U.S. ex rel. Hagerty v. Cyberonics, Inc., 95 F. Supp. 3d 240 (D. Mass. 2015), aff'd, 844 F.3d 26, 96 Fed. R. Serv. 3d 572 (1st Cir. 2016); Ping Chen ex rel. U.S. v. EMSL Analytical, Inc., 966 F. Supp. 2d 282 (S.D. N.Y. 2013); Luna-Reyes v. RFI Const., LLC, 57 F. Supp. 3d 495 (M.D. N.C. 2014); In re Creech, 513 B.R. 482 (Bankr. E.D. N.C. 2014).
Absent a clear congressional statement, a court should not classify a statute as jurisdictional. United States ex rel. Winkelman v. CVS Caremark Corporation, 118 F. Supp. 3d 412 (D. Mass. 2015), aff'd, 827 F.3d 201 (1st Cir. 2016).

[10] Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011); Group Against Smog and Pollution, Inc. v. Shenango Inc., 810 F.3d 116 (3d Cir. 2016); U.S. v. Pocklington, 792 F.3d 1036 (9th Cir. 2015).

[11] Alphas Co., Inc. v. William H. Kopke, Jr., Inc., 708 F.3d 33 (1st Cir. 2013); Hassen v. Government of Virgin Islands, 861 F.3d 108 (3d Cir. 2017); Merritt v. Countrywide Financial Corp., 759 F.3d 1023 (9th Cir. 2014), for additional opinion, see, 583 Fed. Appx. 662 (9th Cir. 2014).

[12] Hassen v. Government of Virgin Islands, 861 F.3d 108 (3d Cir. 2017).

[13] AngioDynamics, Inc. v. Biolitec AG, 823 F.3d 1 (1st Cir. 2016), cert. denied, 137 S. Ct. 631, 196 L. Ed. 2d 519 (2017).

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I. Federal Judicial System

A. Federal Courts in General

§ 7. Congressional authority over state court jurisdiction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013, 2016 to 2018

A.L.R. Library

Propriety of Class Actions Under Telephone Consumer Protection Act, 47 U.S.C.A. s227, 30 A.L.R. Fed. 2d 537

Trial Strategy

Negligent Performance of Advertising Contract, 14 Am. Jur. Proof of Facts 3d 699

Congress may leave the adjudication of federal claims to state courts by the simple expedient of not creating federal court jurisdiction to hear such claims.[1] Congress may require state courts to hear and decide cases based on federal law even though they involve the enforcement of federal penal laws and even though the state has a policy against enforcement by its courts of penal statutes of other states or of the United States.[2] Federal law is enforceable in state courts because the Constitution and laws passed pursuant to it are as much laws in the states as are laws passed by the state legislature, and the Supremacy Clause charges state courts with a coordinate responsibility to enforce federal law according to their regular modes of procedure.[3] A state court may not deny a federal right when the parties and controversy are properly before it, in the absence of a valid excuse, and an excuse that is inconsistent with or violates the federal law is not a valid excuse.[4] Moreover, in those instances where federal court jurisdiction is restricted by an amount-in-controversy requirement, claims not meeting that requirement

are necessarily relegated to the state courts.[5]

Footnotes

1 § 3.

2 Testa v. Katt, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967, 172 A.L.R. 225 (1947).
A state court whose ordinary jurisdiction as prescribed by local laws is appropriate for the occasion may not refuse to entertain suits under the Federal Employers' Liability Act. Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990).

3 Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990), referring to U.S. Const. Art. VI, cl. 2.

4 Howlett By and Through Howlett v. Rose, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332, 60 Ed. Law Rep. 358 (1990) (precluding the state law defense of sovereign immunity in an action under 42 U.S.C.A. § 1983 brought in state court).

5 Hunter v. United Van Lines, 746 F.2d 635, 40 Fed. R. Serv. 2d 581 (9th Cir. 1984).

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I. Federal Judicial System

A. Federal Courts in General

§ 8. Effect of state law on federal court jurisdiction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

Although federal laws can affect state court jurisdiction,[1] state laws cannot affect federal court jurisdiction.[2] State legislation may neither confer jurisdiction on federal courts[3] nor abridge or impair federal court jurisdiction.[4]

Footnotes

1 § 7.

2 Watson v. Tarpley, 59 U.S. 517, 18 How. 517, 15 L. Ed. 509, 1855 WL 8283 (1855).
State action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right to resort to federal court on the basis of diversity of citizenship jurisdiction is void. Lovelace v. Rockingham Memorial Hosp., 299 F. Supp. 2d 617 (W.D. Va. 2004).

3 Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

4 Barrow S.S. Co. v. Kane, 170 U.S. 100, 18 S. Ct. 526, 42 L. Ed. 964 (1898).
States do not have the constitutional authority to limit a federal district court's jurisdiction; that power lies exclusively with Congress. Zahn v. North American Power & Gas, LLC, 847 F.3d 875 (7th Cir. 2017).
In determining their own jurisdiction, the federal courts must look only to Article III of the Constitution and to congressional grants of jurisdiction, and they may not look to the acts of state legislatures. Cunard Line Ltd. v. Abney, 540 F. Supp. 657, 34 Fed. R. Serv. 2d 583 (S.D. N.Y. 1982).

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I. Federal Judicial System

A. Federal Courts in General

§ 9. Administrative adjudications subject to judicial review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

Congress has the power, under Article I of the United States Constitution, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication of claims.[1] Congress, acting for a valid legislative purpose pursuant to its powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[2] Agency resolution of such federal rights may take the form of binding arbitration with limited judicial review.[3]

Article III does not confer on all litigants an absolute right to the plenary consideration of every federal claim by an Article III court, and as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver.[4]

Footnotes

1 Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

2 Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

3 Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985).

4 Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986).

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I. Federal Judicial System

B. Federal Judicial Powers

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I. Federal Judicial System

B. Federal Judicial Powers

§ 10. Scope of federal judicial powers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

The judicial power of the United States can be exercised only by courts, and this power cannot be withdrawn from the courts by Congress.[1] Congress cannot exercise judicial powers.[2] Conversely, Congress cannot confer nonjudicial powers upon the judiciary,[3] although the separation of powers principle is not offended by the presence of federal judges on an administrative commission[4] or by the conferral on federal judges of the power to appoint certain inferior officers.[5] At the same time, there are matters which are susceptible of judicial determination but which Congress may or may not bring within the cognizance of federal courts.[6]

The judicial power includes any matters which by nature were the subject of suits at common law, in equity, or in admiralty,[7] and subsists through all stages of federal judicial proceedings, trial and appellate.[8] Article III of the Constitution gives the federal judiciary the power, not merely to rule on cases, but also to decide them, subject to review only by superior courts in the Article III hierarchy.[9]

Observation:

Article III of the United States Constitution addresses both a structural, or separation of powers, interest, and also protects personal interest, that is, a litigant's right to have claims decided before judges who are free from potential domination by other branches of government.[10]

Courts cannot perform executive duties or treat them as performed when they have been neglected.[11] Courts cannot exercise administrative powers[12] such as fixing rates,[13] or legislative functions[14] such as levying and collecting taxes.[15]

The executive branch may not exercise judicial powers,[16] but it has been held not a violation of this principle for—
— an executive board to make findings of fact and administrative orders.[17]
— a board of commissioners to settle private land claims.[18]
— treasury officials to audit accounts, ascertain balances due, and issue distress warrants.[19]
— the President to approve the price of condemned property.[20]
— the Secretary of War to require alterations in bridges over navigable waters if satisfied, after a hearing, that navigation was unreasonably obstructed.[21]
— executive officers to enforce statutory penalties.[22]
— Congress to limit judicial review of administrative findings.[23]
Certain implied powers must necessarily result to courts of justice from the nature of their institution, and these powers cannot be dispensed within a court because they are necessary to the exercise of all others.[24] Such powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.[25] Because of the very potency of the inherent powers of the federal courts, such powers must be exercised with restraint and discretion, and a primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process.[26] The exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute.[27] A federal court has the inherent power to:[28]

• to vacate its own judgment upon proof that a fraud has been perpetrated upon the court

• to bar from the courtroom a criminal defendant who disrupts a trial

• to dismiss an action on grounds of forum non conveniens

• to act on its own motion to dismiss a suit for failure to prosecute

CUMULATIVE SUPPLEMENT

Cases:

The principle of party presentation recognizes that federal courts are essentially passive instruments of government, and they do not, or should not, sally forth each day looking for wrongs to right; rather, they wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties. United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L. Ed. 372, 1855 WL 8216 (1855).

2 Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377, 1880 WL 18803 (1880).

3 Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L. Ed. 372, 1855 WL 8216 (1855).

4 Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).
The purpose of the general rule that executive or administrative duties of a nonjudicial nature may not be imposed on

judges holding office under Article III is to maintain the separation between the judiciary and the other branches of the federal government by insuring the independence of the judicial branch and insuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by the other branches. Morrison v. Olson, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988).

5 Morrison v. Olson, 487 U.S. 654, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988).

6 Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L. Ed. 372, 1855 WL 8216 (1855).

7 Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L. Ed. 372, 1855 WL 8216 (1855).

8 Teague v. Cooper, 720 F.3d 973, 295 Ed. Law Rep. 473 (8th Cir. 2013).

9 Wyatt v. Syrian Arab Republic, 736 F. Supp. 2d 106 (D.D.C. 2010) (stating, further, that a judgment conclusively resolves the case because a judicial power is one to render dispositive judgments).

10 In re GB Herndon and Associates, Inc., 459 B.R. 148 (Bankr. D. D.C. 2011).

11 U.S. v. McLean, 95 U.S. 750, 24 L. Ed. 579, 1877 WL 18569 (1877).

12 Interstate Commerce Commission v. Illinois Cent. R. Co., 215 U.S. 452, 30 S. Ct. 155, 54 L. Ed. 280 (1910); Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316 (C.C.A. 3d Cir. 1944).

13 Central Kentucky Natural Gas Co. v. Railroad Com'n of Kentucky, 290 U.S. 264, 54 S. Ct. 154, 78 L. Ed. 307 (1933).

14 McCray v. U.S., 195 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

15 Heine v. Board of Levee Com'rs, 86 U.S. 655, 22 L. Ed. 223, 1873 WL 16061 (1873).

16 Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L. Ed. 372, 1855 WL 8216 (1855).

17 Sullivan v. Union Stockyards Co. of Omaha, 26 F.2d 60 (C.C.A. 8th Cir. 1928).

18 U.S. v. Ritchie, 58 U.S. 525, 17 How. 525, 15 L. Ed. 236, 1854 WL 7503 (1854).

19 Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L. Ed. 372, 1855 WL 8216 (1855).

20 Shoemaker v. U.S., 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170 (1893).

21 President, Managers & Co of Monongahela Bridge Co v. U S, 216 U.S. 177, 30 S. Ct. 356, 54 L. Ed. 435 (1910); Union Bridge Co. v. U S, 204 U.S. 364, 27 S. Ct. 367, 51 L. Ed. 523 (1907).

22 Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 29 S. Ct. 671, 53 L. Ed. 1013 (1909).

23 Wheeling Corrugating Co. v. McManigal, 41 F.2d 593 (C.C.A. 4th Cir. 1930).

24 Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, 19 Fed. R. Serv. 3d 817 (1991).

25 Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, 19 Fed. R. Serv. 3d 817 (1991).

26 Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, 19 Fed. R. Serv. 3d 817 (1991) (upholding the court's inherent power to assess attorney's fees as a sanction for a party's bad-faith conduct in the course of litigation).

27 Dietz v. Bouldin, 136 S. Ct. 1885, 195 L. Ed. 2d 161 (2016).

28 Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27, 19 Fed. R. Serv. 3d 817 (1991).

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Works.

32 Am. Jur. 2d Federal Courts § 11

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I. Federal Judicial System

B. Federal Judicial Powers

§ 11. Review of legislative acts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

Courts cannot perform legislative functions,[1] but the judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law.[2] Courts must therefore interpret statutes[3] and determine what law must be followed when statutes conflict with each other or with the Constitution.[4] Congress may also declare statutorily the meaning of an earlier statute, thereby binding the courts in reference to all transactions occurring after the passage of the earlier statute, provided no constitutional rights are violated.[5]

In reviewing statutes, courts are confined to the question whether they accord with the Constitution.[6] In addition to giving effect to the presumption that a federal statute is constitutional,[7] courts must refrain from passing on the wisdom[8] or propriety[9] of legislation, the motives of the legislators,[10] the necessity for an exception to the statute,[11] or the necessity of a statute's continued effectiveness.[12]

A district court cannot, through its equitable powers to fashion injunctive relief, override Congress's policy choice, articulated in a statute, as to what behavior should be prohibited, and once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the courts to enforce them when enforcement is sought.[13] Thus, courts of equity cannot, in their discretion to fashion injunctive relief, reject the balance that Congress has struck in a statute; their choice, unless there is statutory language to the contrary, is simply whether a particular means of enforcing the statute should be chosen over another permissible means and not whether enforcement is preferable to no enforcement at all.[14]

Footnotes

[1] § 10.

[2] Bank of Hamilton v. Dudley's Lessee, 27 U.S. 492, 7 L. Ed. 496, 1829 WL 3184 (1829).
It is the province and duty of the federal judicial department to say what the law is. Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

[3] U.S. v. Dickson, 40 U.S. 141, 10 L. Ed. 689, 1841 WL 5028 (1841).

[4] Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803).

[5] Stockdale v. Atlantic Ins. Co., 87 U.S. 323, 22 L. Ed. 348, 1873 WL 15944 (1873).

[6] U. S. v. Lambert, 123 F.2d 395 (C.C.A. 3d Cir. 1941).

[7] U.S. v. Harris, 106 U.S. 629, 1 S. Ct. 601, 27 L. Ed. 290 (1883).

[8] Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946); U.S. v. American Union Transport, 327 U.S. 437, 66 S. Ct. 644, 90 L. Ed. 772 (1946).

[9] North Am. Co. v. Securities and Exchange Commission, 327 U.S. 686, 66 S. Ct. 785, 90 L. Ed. 945 (1946).

[10] Calder v. People of State of Michigan, 218 U.S. 591, 31 S. Ct. 122, 54 L. Ed. 1163 (1910).

[11] Maxwell v. Moore, 63 U.S. 185, 22 How. 185, 16 L. Ed. 251, 1859 WL 10605 (1859); French's Lessee v. Spencer, 62 U.S. 228, 21 How. 228, 16 L. Ed. 97, 1858 WL 9384 (1858).

[12] Porter v. Granite State Packing Co., 155 F.2d 786 (C.C.A. 1st Cir. 1946).

[13] U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

[14] U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001).

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I. Federal Judicial System

B. Federal Judicial Powers

§ 12. Review of executive conduct

Topic Summary | Correlation Table | References

West's Key Number Digest

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Courts may interpret executive orders[1] and they may review executive action to make sure that it is within statutory limits, is based on facts fairly found, and is not arbitrary, capricious, or fanciful.[2] They must rule on a presidential claim of executive privilege as a ground for quashing a subpoena.[3] Furthermore, Congress may empower the federal courts to enforce administrative subpoenas.[4]

However, an executive officer is not subject to judicial control in the exercise of such officer's judgment and discretion,[5] such as by mandamus or injunction.[6] The judicial department cannot enjoin the President in the performance of the President's official duties.[7] Federal courts will not review the exercise of executive discretion in making appointments,[8] granting pardons,[9] or disposing of public lands.[10] A federal court must give effect to the proved official acts of government officers acting within their jurisdiction.[11] The executive branch's decision as to sovereignty over territory is conclusive on the judiciary.[12] The executive branch has the exclusive right to recognize or refuse to recognize a new government in a foreign country claiming to have displaced an old established government.[13] The federal courts cannot question the executive decision to recognize[14] or refuse to recognize a foreign government.[15]

Footnotes

1 Ex parte Mitsuye Endo, 323 U.S. 283, 65 S. Ct. 208, 89 L. Ed. 243 (1944).

2 United Air Lines v. Civil Aeronautics Bd., 155 F.2d 169 (App. D.C. 1946).

3 U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

[4] Interstate Commerce Commission v. Brimson, 154 U.S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894).

[5] Gaines v. Thompson, 74 U.S. 347, 19 L. Ed. 62, 1868 WL 11135 (1868); Ainsworth v. Barn Ballroom Co., Inc, 157 F.2d 97 (C.C.A. 4th Cir. 1946).

[6] City of New Orleans v. Paine, 147 U.S. 261, 13 S. Ct. 303, 37 L. Ed. 162 (1893); Noble v. Union River Logging R. Co., 147 U.S. 165, 13 S. Ct. 271, 37 L. Ed. 123 (1893).

[7] State of Mississippi v. Johnson, 71 U.S. 475, 18 L. Ed. 437, 1866 WL 9457 (1866).

[8] Keim v. U.S., 35 Ct. Cl. 628, 177 U.S. 290, 20 S. Ct. 574, 44 L. Ed. 774 (1900).

[9] U.S. v. Klein, 80 U.S. 128, 20 L. Ed. 519, 1871 WL 11371 (1871).

[10] U.S. ex rel. Jordan v. Ickes, 143 F.2d 152 (App. D.C. 1944).

[11] The Maret, 2 V.I. 418, 145 F.2d 431 (C.C.A. 3d Cir. 1944); Cummings v. Isenberg, 89 F.2d 489 (App. D.C. 1937).

[12] Williams v. Suffolk Ins. Co., 38 U.S. 415, 10 L. Ed. 226, 1839 WL 4330 (1839).

[13] Kennett v. Chambers, 55 U.S. 38, 14 How. 38, 14 L. Ed. 316, 1852 WL 6773 (1852).

[14] U.S. ex rel. Cardashian v. Snyder, 44 F.2d 895 (App. D.C. 1930).

[15] The Maret, 2 V.I. 418, 145 F.2d 431 (C.C.A. 3d Cir. 1944).

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I. Federal Judicial System

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§ 13. Decision of political questions reserved to executive and legislative branches of government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

A.L.R. Library

Application of Political Question Doctrine by U.S. Supreme Court, 75 A.L.R. Fed. 2d 1

Treatises and Practice Aids

Wright and Miller et al., Federal Practice and Procedure, Jurisdiction and Related Matters §§ 3534 to 3534.3 (3d ed.)

The federal courts do not decide political questions, which are reserved for the executive and legislative branches.[1] Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potential for embarrassment from multifarious pronouncements by various departments on one question.[2] Where a

case presents none of these characteristics, which are essential to a finding that the case raises a political question, the case is justiciable.[3] Unless one of these formulations is inextricable from the case, there should be no dismissal for nonjusticiability on the ground of a political question.[4]

The federal courts cannot enforce the constitutional guarantee of a republican form of government,[5] determine who is the sovereign of a territory,[6] or determine the end of a war declared by Congress.[7]

Federal judicial powers as to political questions are also inhibited by the act of state doctrine, which declares that a United States court will not inquire into the validity of the public acts which a recognized foreign sovereign power committed within its own territory.[8]

Footnotes

1 The Divina Pastora, 17 U.S. 52, 4 L. Ed. 512, 1819 WL 2183 (1819); U.S. v. Lamothe, 152 F.2d 340 (C.C.A. 2d Cir. 1945).
On a petition for judicial review of a decision of the United States Secretary of State to designate a group as a "foreign terrorist organization," the court of appeals lacked authority to review the required finding that the organization's terrorist activity threatened national security, inasmuch as such a determination constitutes a nonjusticiable political judgment. People's Mojahedin Organization of Iran v. U.S. Dept. of State, 182 F.3d 17 (D.C. Cir. 1999).

2 Davis v. Bandemer, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986); Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).
A controversy is nonjusticiable—that is, it involves a political question—where there is (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, or (2) a lack of judicially discoverable and manageable standards for resolving the issue; courts, in the first instance, must interpret the text in question and determine whether and to what extent the issue is textually committed; the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it, and the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch. Nixon v. U.S., 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

3 U.S. v. Munoz-Flores, 495 U.S. 385, 110 S. Ct. 1964, 109 L. Ed. 2d 384 (1990).
A justiciable controversy is presented by a "political gerrymander" case, in which members of a state's Democratic party, alleging that a reapportionment plan for state legislative districts violates their right to equal protection because the district lines were drawn with the intention and effect of disadvantaging Democrats, raise the claim that each political group in the state should have the same chance to elect representatives of its choice as any other political group; this action does not present a nonjusticiable political question since disposition of the question presented does not involve the courts in a matter more properly decided by a coequal branch of government, and it does not appear that there are no judicially manageable standards by which political gerrymander cases are to be decided. Davis v. Bandemer, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986).

4 Davis v. Bandemer, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986); Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

5 Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937).

6 Jones v. U.S., 137 U.S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890).

7 Citizens Protective League v. Clark, 155 F.2d 290 (App. D.C. 1946).

8 Am. Jur. 2d, International Law §§ 53 to 66.

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I. Federal Judicial System

B. Federal Judicial Powers

§ 14. Congressional control over judicial procedure

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

Congress has exclusive power to regulate practice in federal courts,[1] except as to the constitutionally prescribed jurisdiction of federal courts.[2] Thus, Congress may legislate as to the form and effect of process, mesne, and final;[3] as to venue[4] and change of venue;[5] or as to denial of untimely motions for new trial.[6] Legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions.[7]

Footnotes

1 Keary v. Farmers' & Merchants' Bank, 41 U.S. 89, 10 L. Ed. 897, 1842 WL 5747 (1842); Wayman v. Southard, 23 U.S. 1, 6 L. Ed. 253, 1825 WL 3149 (1825).

2 Chicago & N.W.R. Co. v. Whitton, 80 U.S. 270, 20 L. Ed. 571, 1871 WL 14780 (1871).

3 Riggs v. Johnson County, 73 U.S. 166, 18 L. Ed. 768, 1867 WL 11194 (1867), aff'd, 73 U.S. 518, 18 L. Ed. 918, 1867 WL 11218 (1867).

4 U.S. v. Union Pac. R. Co., 98 U.S. 569, 25 L. Ed. 143, 1878 WL 18410 (1878).

5 Stuart v. Laird, 5 U.S. 299, 2 L. Ed. 115, 1803 WL 948 (1803).

6 James v. Appel, 192 U.S. 129, 24 S. Ct. 222, 48 L. Ed. 377 (1904).

7 Yakus v. U. S., 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

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I. Federal Judicial System

B. Federal Judicial Powers

§ 15. Scope of supervisory powers of federal courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2021

In the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress[1] to implement a remedy for violation of recognized rights or as a remedy designed to deter illegal conduct.[2] Judges have broad discretion, as part of their supervisory powers, to control and maintain their courtrooms, to determine which lawyers are allowed to appear before them.,[3] to supervise and discipline attorney who appear before them, and to fashion an appropriate sanction for conduct which abuses the judicial process, including assessing attorney's fees or dismissing a case.[4]

A federal court may use its supervisory power to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by the Supreme Court and by Congress to ensure the integrity of the grand jury's functions.[5] Given the grand jury's role as an independent body, however, the district court's supervisory power over it is a very limited one[6] and may be used only to preserve or enhance the traditional functioning of the grand jury.[7]

The purposes underlying the use of supervisory powers are threefold: (1) to implement a remedy for violation of recognized rights, (2) to preserve judicial integrity by insuring that a criminal conviction rests on appropriate considerations validly before the jury, and (3) as a remedy designed to deter illegal conduct.[8]

The courts of appeals have supervisory powers that permit the promulgation of procedural rules governing the management of litigation and which are deemed desirable from the viewpoint of sound judicial practice although not commanded by statute or by the Constitution.[9] The courts of appeals have often exercised their supervisory powers,[10] as by establishing a procedure for sua sponte dismissal of complaints,[11] ruling that any contact between a party's agent and a juror is per se prejudicial,[12] and by establishing procedures for enjoining publication of information concerning criminal trials.[13] To assist the court in carrying out its function of appellate review, the court of appeals may exercise its inherent supervisory power to

require the district courts to provide an explanation for their orders granting summary judgment[14] or granting a directed verdict.[15] The court of appeals' supervisory authority over the district courts is limited to supervising their judicial activities and does not encompass the courts' internal or personnel administration.[16]

The supervisory power is an extraordinary one[17] that is exercised sparingly, depending on the specific circumstances at hand.[18] Even if exercised in a sensible and efficient fashion, however, the supervisory power of federal courts is invalid if it conflicts with constitutional or statutory provisions;[19] a contrary result would confer on the judiciary the discretionary power to disregard the considered limitations of the law it is charged with enforcing.[20]

Observation:

That a district court loses jurisdiction over litigation upon the plaintiff's filing of a notice of dismissal does not deprive it of its inherent supervisory powers.[21]

Footnotes

1 Bank of Nova Scotia v. U.S., 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988); U.S. v. Hasting, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983); United States v. Khatallah, 160 F. Supp. 3d 144 (D.D.C. 2016).
As to the United States Supreme Court's supervisory powers, see § 455.

2 United States v. Khatallah, 160 F. Supp. 3d 144 (D.D.C. 2016).

3 Archuleta v. Turley, 904 F. Supp. 2d 1185 (D. Utah 2012).

4 Archuleta v. Turley, 904 F. Supp. 2d 1185 (D. Utah 2012).

5 United States v. Fisher, 225 F. Supp. 3d 151 (W.D. N.Y. 2016), subsequent determination, 2017 WL 2790651 (W.D. N.Y. 2017).

6 Carlson v. United States, 837 F.3d 753 (7th Cir. 2016).

7 Carlson v. United States, 837 F.3d 753 (7th Cir. 2016).

8 U.S. v. Hasting, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983); United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017); U.S. v. Chapman, 524 F.3d 1073 (9th Cir. 2008); United States v. Resendiz-Guevara, 145 F. Supp. 3d 1128 (M.D. Fla. 2015); Schoenauer v. U.S., 759 F. Supp. 2d 1090 (S.D. Iowa 2010); U.S. v. Jones, 620 F. Supp. 2d 163 (D. Mass. 2009), subsequent determination, 686 F. Supp. 2d 147 (D. Mass. 2010), order supplemented, (May 7, 2010).

9 Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435, 3 Fed. R. Serv. 3d 436 (1985).

10 Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435, 3 Fed. R. Serv. 3d 436 (1985).

11 Tingler v. Marshall, 716 F.2d 1109, 37 Fed. R. Serv. 2d 934 (6th Cir. 1983).

12 U.S. v. Florea, 541 F.2d 568 (6th Cir. 1976).

13 U.S. v. Schiavo, 504 F.2d 1 (3d Cir. 1974).

14 Vadino v. A. Valey Engineers, 903 F.2d 253, 16 Fed. R. Serv. 3d 682 (3d Cir. 1990).

15 Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 19 Fed. R. Serv. 3d 381 (3d Cir. 1991).

16 In re Pickett, 842 F.2d 993 (8th Cir. 1988).

17 United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017); United States v. Saena Tech Corporation, 140 F. Supp. 3d 11 (D.D.C. 2015) (referring to the supervisory power of federal courts over the administration of criminal justice).

18 United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017); In re Furlong, 885 F.2d 815 (11th Cir. 1989).

19 United States v. Saena Tech Corporation, 140 F. Supp. 3d 11 (D.D.C. 2015).

20 Bank of Nova Scotia v. U.S., 487 U.S. 250, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988); Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435, 3 Fed. R. Serv. 3d 436 (1985).

21 Bechuck v. Home Depot U.S.A., Inc., 814 F.3d 287, 93 Fed. R. Serv. 3d 1384 (5th Cir. 2016).

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I. Federal Judicial System

B. Federal Judicial Powers

§ 16. Authority of court clerks and deputies to administer oaths and acknowledgments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2013

Each clerk of court and the clerk's deputies may administer oaths and affirmations and take acknowledgments.[1] The deputy clerk of a United States district court is authorized to administer an oath to a special attorney for the United States.[2] Oaths administered by court clerks and their deputies are subject to statutory perjury prohibitions.[3]

Footnotes

1 28 U.S.C.A. § 953.

2 U.S. v. Lawson, 523 F.2d 15 (8th Cir. 1975).

3 U.S. v. Lester, 248 F.2d 329 (2d Cir. 1957).

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I. Federal Judicial System

C. Judicial Councils and Conferences

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I. Federal Judicial System

C. Judicial Councils and Conferences

§ 17. Judicial Conference of United States

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2011, 2013, 2014

At least annually, and at such special sessions as the Chief Justice of the United States may call, the Chief Justice convenes the Judicial Conference of the United States.[1] The Chief Justice presides, and the other participants are the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit.[2] Every judge summoned must attend and, unless excused by the Chief Justice, must remain throughout the sessions of the conference and advise as to the needs of the judge's circuit or court and as to any matters in respect of which the administration of justice in the federal courts may be improved.[3]

The Judicial Conference of the United States is a part of the judicial branch of government[4] and has four main functions:

(1) To make a comprehensive survey of the condition of business in the federal courts, prepare plans for assignment of judges to or from circuits or districts where necessary, and submit suggestions to the various courts to effectuate uniformity and expedition of business.[5]

(2) To conduct a continuous study of the operation and effect of Supreme Court-promulgated rules for practice and procedure in the lower federal courts and to recommend changes in and additions to the rules.[6]

(3) To review rules prescribed under 28 U.S.C.A. § 2071 by the courts, other than the Supreme Court and the district courts, for consistency with federal law, and to modify or abrogate any such rule found to be inconsistent.[7]

(4) To convene institutes and joint councils on sentencing.[8]

Footnotes

[1] 28 U.S.C.A. § 331.

[2] 28 U.S.C.A. § 331.

[3] 28 U.S.C.A. § 331.

[4] Duplantier v. U.S., 480 F. Supp. 40 (E.D. La. 1979), aff'd as modified on other grounds, 606 F.2d 654 (5th Cir. 1979).

[5] 28 U.S.C.A. § 331.

[6] 28 U.S.C.A. § 331.

[7] 28 U.S.C.A. § 331.

[8] 28 U.S.C.A. § 334.

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I. Federal Judicial System

C. Judicial Councils and Conferences

§ 18. Circuit judicial conferences

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2011, 2013, 2014

Annually or biennially, the chief judge of each circuit must convene and preside at the judicial conference of the circuit for the purpose of considering the business of the courts and advising means of improving the administration of justice within the circuit.[1] Besides the chief judge, the participants are the circuit, district, magistrate, and bankruptcy judges of the circuit who are in active service.[2] In addition, the court of appeals for each circuit must provide by its rules for representation and active participation at the conference by members of the bar of the circuit.[3] Some circuits have published such rules as a part of their rules of procedure[4] while other courts have made the applicable rules available as addenda or orders to their rules of procedure.[5]

The judges of the District Court of Guam, the District Court of the Virgin Islands, and the District Court of the Northern Mariana Islands may also be summoned biennially or annually to the conferences of their respective circuits.[6]

Footnotes

1 28 U.S.C.A. § 333.

2 28 U.S.C.A. § 333.

3 28 U.S.C.A. § 333.

4 D.C. Cir. R. 47.3; First Cir. R. 47.1; Third Cir. R. 105.0; Sixth Cir. R. 205; Seventh Cir. R. 60; Tenth Cir. R. 47.3; Fed. Cir. R. 53.

[5] 2nd Cir. IOP I; 4th Cir. IOP 47.1, 47.2; 5th Cir. Other IOP; 8th Cir. IOP; 11th Cir. Add. I.

[6] 28 U.S.C.A. § 333.

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I. Federal Judicial System

C. Judicial Councils and Conferences

§ 19. Circuit judicial councils

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2011, 2013, 2014

Each circuit has a judicial council which consists of the chief judge of the circuit, a number of circuit judges, and a number of district judges.[1] The chief judge must convene a meeting of the judicial council of the circuit at least twice each year.[2] Although the court of appeals judges meeting as the circuit judicial council exercise certain supervisory powers for the expeditious administration of the business of the courts within the circuit, they act as a council and not as a court.[3]

Each circuit judicial council has two statutorily defined purposes: (1) taking any action necessary on the semiannual reports of the Director of the Administrative Office of the United States Courts, which reports must be submitted to the council by the chief judge;[4] and (2) making all necessary orders for the effective and expeditious administration of the business of the courts within the circuit, the district judges being required to carry out promptly the council's orders.[5] The delegation of these powers to the circuit councils has been held constitutional.[6]

Circuit judicial councils may assign judges,[7] promulgate rules and resolutions,[8] such as rules on conflicts of interest[9] or the prompt disposition of criminal cases;[10] or adopt special procedures, such as procedures for processing complaints of judicial misconduct.[11]

Practice Tip:

One seeking to challenge a rule adopted by a circuit judicial council cannot proceed against the council in a district court proceeding for a writ of mandamus or a declaratory judgment; rather, the remedy is to appeal the district court's order enforcing the rule, even though this places the court of appeals in the position of reviewing indirectly the action of the council.[12]

An administrative proceeding for considering complaints of judicial misconduct cannot be used by counsel as a tactical option to speed disposition of a particular piece of litigation.[13] The proper remedy in a case of alleged judicial partiality is under the general judicial disqualification statute,[14] which requires that any judge disqualify him- or herself in any proceeding in which the judge's impartiality might reasonably be questioned.[15]

Footnotes

1 28 U.S.C.A. § 332(a).

2 28 U.S.C.A. § 332(a)(1).

3 Henry v. U.S., 432 F.2d 114 (9th Cir. 1970), opinion modified on other grounds, 434 F.2d 1283 (9th Cir. 1971).

4 28 U.S.C.A. § 332(c).

5 28 U.S.C.A. § 332(d).

6 Chandler v. Judicial Council of Tenth Circuit of U. S., 398 U.S. 74, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970); In re Imperial "400" Nat., Inc., 481 F.2d 41 (3d Cir. 1973).

7 Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962).

8 In re Imperial "400" Nat., Inc., 481 F.2d 41 (3d Cir. 1973).

9 In re Imperial "400" Nat., Inc., 481 F.2d 41 (3d Cir. 1973).

10 Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973).

11 In re Charge of Judicial Misconduct, 613 F.2d 768 (9th Cir. 1980); In re Charge of Judicial Misconduct, 595 F.2d 517 (9th Cir. 1979).
As to procedures for processing complaints against judges, see §§ 36 to 41.

12 In re Imperial "400" Nat., Inc., 481 F.2d 41 (3d Cir. 1973).

13 In re Charge of Judicial Misconduct, 593 F.2d 879 (9th Cir. 1979).

14 28 U.S.C.A. § 455(a).

15 In re Charge of Judicial Misconduct, 613 F.2d 768 (9th Cir. 1980).
As to disqualification of judges for partiality, see §§ 58 to 65.

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II. Judges

A. Constitutional Powers and Prerogatives

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West's Key Number Digest, Judges 1 to 4, 7, 22(7)

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II. Judges

A. Constitutional Powers and Prerogatives

§ 20. Constitutional Article III federal court judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2018

West's Key Number Digest, Judges 1 to 4, 7

Article III of the Constitution provides that the judicial power of the United States is to be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish, and that the judges of both the Supreme Court and inferior courts are to hold their offices during good behavior and will, at stated times, receive for their services a compensation which will not be diminished during their continuance in office.[1]

The United States Constitution assigns the judicial power to decide cases and controversies to an independent branch of government populated by judges who serve without fixed terms and whose salaries may not be diminished.[2] District court judges enjoy the protections of Article III, namely, life tenure and pay that cannot be diminished.[3] Article III serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government.[4] Article III preserves the impartiality of courts through two key safeguards: life tenure and salary protection.[5] The constitutional design, in assigning the power to decide cases and controversies to an independent judiciary, is all about ensuring "clear heads" and "honest hearts," the essential ingredients of "good judges."[6]

Footnotes

1 U.S. Const. Art. III, § 1.

2 In re Renewable Energy Development Corp., 792 F.3d 1274 (10th Cir. 2015).

3 Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015).

[4] Savoca v. United States, 199 F. Supp. 3d 716 (S.D. N.Y. 2016).

[5] Coleman v. Labor and Industry Review Commission of Wisconsin, 860 F.3d 461 (7th Cir. 2017).
As to life tenure of Article III judges, see § 21.
As to protection of compensation from diminution, see § 22.

[6] In re Renewable Energy Development Corp., 792 F.3d 1274 (10th Cir. 2015).

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II. Judges

A. Constitutional Powers and Prerogatives

§ 21. Life tenure of Article III federal court judges; impeachment and removal from office

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 7

Judges of Article III courts have life tenure and pay that cannot be diminished, protections which help to ensure the integrity and independence of the judiciary.[1] The purpose of life tenure for federal judges is to ensure their independence, including from any "manager."[2]

Judges of Article III courts are entitled to hold their offices during good behavior,[3] which means that they are removable only via impeachment and conviction; that arrangement aims to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of government.[4] Congress, not private individuals, has exclusive authority to enforce the Article III Good Behavior Clause by initiating impeachment proceedings against federal judges.[5] Thus, a judge may be impeached, although the tenure provision of Article III does not permit impeachment for conduct less serious than that which triggers the impeachment provisions of Articles I and II—commission of treason, bribery, or other high crimes and misdemeanors.[6] In addition, a federal judge may be prosecuted for crimes even though he or she has not yet been impeached and even though a conviction may result in the judge's removal from office—Article III provides no immunity from indictment.[7]

Under the recess appointments clause,[8] the President may constitutionally confer temporary federal judicial commissions during a recess of the Senate, notwithstanding the Article III requirement of life tenure.[9]

Footnotes

[1] Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015); Reed v. Nathan, 558 B.R. 800 (E.D. Mich. 2016).

As to constitutional Article III federal court judges, see § 20.
As to protection of compensation from diminution, see § 22.

[2] Landrith v. Roberts, 999 F. Supp. 2d 8 (D.D.C. 2013), aff'd, 2014 WL 3014730 (D.C. Cir. 2014).

[3] U.S. Const. Art. III, § 1.

[4] Kuretski v. C.I.R., 755 F.3d 929 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 2309, 191 L. Ed. 2d 977 (2015).

[5] Smith v. Scalia, 44 F. Supp. 3d 28 (D.D.C. 2014), aff'd, (D.C. Circ. 14-5180)(Jan. 14, 2015).

[6] U.S. v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (rejected on other grounds by, U.S. v. Gimbel, 830 F.2d 621 (7th Cir. 1987)).
As to disciplinary proceeding against judges, see §§ 36 to 41.

[7] U.S. v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (rejected on other grounds by, U.S. v. Gimbel, 830 F.2d 621 (7th Cir. 1987)).

[8] U.S. Const. Art. II, § 2, cl. 3.

[9] U.S. v. Woodley, 751 F.2d 1008 (9th Cir. 1985).

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II. Judges

A. Constitutional Powers and Prerogatives

§ 22. Protection of compensation from diminution for Article III federal court judges; effect of taxation or inflation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 7, 22(7)

Under Article III, the compensation of a judge may not be diminished during his or her continuation in office.[1] The protections of Article III help to ensure the integrity and independence of the judiciary[2] by assuring that their decisions are not swayed by a Congress which may wish to hold their subsistence hostage.[3]

A federal judge's salary may not be diminished, either directly or indirectly, but this does not exempt a judge from the burdens of citizenship so long as those burdens are not discriminatorily applied.[4] Federal judges do not have an automatic immunity from income taxation, and it is not unconstitutional for Congress to provide in a revenue act that all judges taking office after the effective date of the act must pay income taxes.[5] A judge who takes office with the understanding that his or her income will be subject to taxation cannot claim that the salary has been diminished if the judge is only paid the salary prescribed by statute less income taxes withheld.[6]

The framers of the Constitution recognized the possible effect of inflation on judicial compensation and determined that while Congress could not diminish the monetary value of salaries received by judges, it could increase their compensation to meet economic changes.[7] To be sure, the Compensation Clause does not require periodic increases in judicial salaries to offset inflation or any other economic forces.[8] However, the dual purpose of the Compensation Clause of Article III protects not only judicial compensation that has already taken effect but also reasonable expectations of maintenance of that compensation level.[9]

In recent years Congress has attempted to deal with the problem of establishing the salaries of high-level officials in the executive, legislative, and judicial branches by enacting the Federal Salary Act[10] and the Federal Pay Comparability Act.[11] The salary level of judges was also redefined as being the annual rate determined under the Federal Salary Act as adjusted by 28 U.S.C.A. § 461.[12]

Adjustments in the salaries of judges is provided for by statute,[13] although an adjustment cannot result in the reduction of a salary of an Article III judge during such individual's continuance in office.[14] The Supreme Court has also found a distinction between attempts to prospectively modify a formula for determining the compensation of judges and attempts to roll back increases already granted by statute, with the former being permissible while the latter is not.[15]

Footnotes

1 U.S. Const. Art. III, § 1.

2 Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015); Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC, 490 B.R. 46 (S.D. N.Y. 2013).
As to constitutional Article III federal court judges, see § 20.

3 O'Donoghue v. U.S., 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933); Coleman v. Labor and Industry Review Commission of Wisconsin, 860 F.3d 461 (7th Cir. 2017).

4 O'Malley v. Woodrough, 307 U.S. 277, 59 S. Ct. 838, 83 L. Ed. 1289, 122 A.L.R. 1379 (1939).

5 O'Malley v. Woodrough, 307 U.S. 277, 59 S. Ct. 838, 83 L. Ed. 1289, 122 A.L.R. 1379 (1939).

6 Baker v. C.I.R., 149 F.2d 342 (C.C.A. 4th Cir. 1945).

7 U. S. v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980).

8 Beer v. U.S., 696 F.3d 1174 (Fed. Cir. 2012).

9 Beer v. U.S., 696 F.3d 1174 (Fed. Cir. 2012) (holding that cost of living adjustments (COLAs) established by the Ethics Reform Act (ERA) triggered Article III Compensation Clause's basic expectations and protections, thereby preventing Congress from abrogating the ERA's precise and definite commitment to automatic yearly cost of living adjustments for sitting members of the judiciary, and legislation that blocked five years of COLAs for Article III judges constituted an unconstitutional deprivation of judicial compensation).

10 2 U.S.C.A. §§ 351 to 364.

11 5 U.S.C.A. §§ 5305, 5306.

12 28 U.S.C.A. §§ 5, 44(d), 135, 172(b), 252.

13 28 U.S.C.A. § 461(a).

14 28 U.S.C.A. § 461(b).

15 U. S. v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980).

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II. Judges

A. Constitutional Powers and Prerogatives

§ 23. Federal court judges not appointed under Article III

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 2018

West's Key Number Digest, Judges 7

Over time the Supreme Court has recognized three "narrow" situations in which persons otherwise entitled to a federal forum may wind up having their dispute resolved by someone other than an Article III judge.[1] Cases arising in the territories or the armed forces or those involving "public rights" may be sent to Article I tribunals of Congress's creation even if decisionmakers there do not enjoy the same insulation and independence as Article III judges. Bankruptcy courts are legislative creations of just this sort.[2] Congress has authorized the appointment of bankruptcy and magistrate judges, who do not enjoy the protections of Article III, to assist Article III courts in their work.[3]

Judicial officers of legislative courts do not enjoy the benefits of Article III status, such as life tenure.[4] Furthermore, a litigant in an Article I court has no right to have his or her case heard by an Article III judge.[5] While a litigant in an Article III court, such as a United States district court, does have the right to have his or her case heard by an Article III judge,[6] entitlement to an Article III adjudicator is a "personal right" and thus ordinarily is subject to waiver.[7]

There are some matters which do not inherently or necessarily require judicial determination which can be assigned to legislative courts or administrative agencies but which may also be assigned to Article III courts, and in such cases a congressional declaration as to the nature of the court and judge is controlling.[8] Thus, the local judges in the District of Columbia were originally considered to be Article III judges[9] until Congress reorganized the court system and expressly declared otherwise.[10]

Footnotes

[1] As to constitutional Article III federal court judges, see § 20.

[2] In re Renewable Energy Development Corp., 792 F.3d 1274 (10th Cir. 2015).
Congress may create non-Article III courts that finally adjudicate a matter only in three instances: territorial courts, courts martial, and courts that adjudicate cases involving public rights. In re Albertson, 535 B.R. 662 (S.D. W. Va. 2015).

[3] Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015).

[4] Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).
As to legislative courts, see § 2.

[5] Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

[6] Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962); Williams v. U.S., 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933).

[7] Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015); In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011).

[8] Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962).

[9] O'Donoghue v. U.S., 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933).

[10] Palmore v. U.S., 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

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West's Key Number Digest

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§ 24. Statutory provisions and definitions applicable to federal judges

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West's Key Number Digest

West's Key Number Digest, Judges 20, 21

Certain general statutory provisions applicable to courts and judges are contained in Title 28 of the United States Code.[1] As used in Title 28 and, by implication, elsewhere in the United States Code,[2] a "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts, the Court of International Trade, and any court created by Act of Congress whose judges are entitled to hold office in good behavior.[3] The term "judge of the United States" includes judges of the courts of appeals, district courts, the Court of International Trade, and any court created by Act of Congress whose judges are entitled to hold office during good behavior, while the term "Justice of the United States" includes the Chief Justice of the United States and the Associate Justices of the Supreme Court.[4] In addition, several provisions applicable to courts and judges[5] also apply to the United States Court of Federal Claims and to any territorial court established by Congress which is invested with any jurisdiction also granted to district courts.[6] Bankruptcy courts are not listed in the definition of "courts of the United States" and as presently constituted are not Article III courts.[7]

Footnotes

1 28 U.S.C.A. §§ 451 et seq.

2 Miranda v. U S, 255 F.2d 9 (1st Cir. 1958).

3 28 U.S.C.A. § 451.

4 28 U.S.C.A. § 451.

5 28 U.S.C.A. §§ 452 to 459, 462.

[6] 28 U.S.C.A. § 460.

[7] In re Renewable Energy Development Corp., 792 F.3d 1274 (10th Cir. 2015); In re Davis, 899 F.2d 1136 (11th Cir. 1990).
As to federal court judges not appointed under Article III, see § 23.

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§ 25. Oath required of federal judges

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West's Key Number Digest

West's Key Number Digest, Judges 5

Each Justice or judge of the United States must take the following oath or affirmation before performing the duties of his or her office:

"I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."[1] While federal judges have a statutory obligation to take an oath before performing the duties of their office, nothing in this statute (or elsewhere in the law) requires that a judge demonstrate to the satisfaction of a litigant in a particular case that he or she has taken this oath.[2]

It is clear that all federal judges are bound by a solemn moral obligation to regulate their decisions agreeably to the Constitution and laws of the United States.[3] Every litigant is entitled to have his or her case heard by a judge mindful of this oath.[4] However, neither the oath nor the disqualification statute[5] guarantees a litigant that each judge will start off from dead center in his or her willingness or ability to reconcile the opposing arguments of counsel with his or her understanding of the Constitution and law.[6] Thus, the oath does not mandate that a judge disqualify him or herself for the reason that while, as an employee of the government in another capacity, he or she made his or her views known on a question of law similar to that presented in a case or had a part in drafting a statute which may be at issue in a case.[7]

Practice Tip:

Neither the clause of the Constitution which mandates that federal judges swear an oath of allegiance to the Constitution[8] nor the statutory oath requirement[9] create a substantive cause of action against federal judges for violating that oath by acting contrary to the Constitution.[10]

Footnotes

1 28 U.S.C.A. § 453.

2 U.S. v. Conces, 507 F.3d 1028 (6th Cir. 2007); In re Anthony, 481 B.R. 602 (D. Neb. 2012).

3 U.S. v. Callender, 25 F. Cas. 239, No. 14709 (C.C.D. Va. 1800).

4 Laird v. Tatum, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972) (per Rehnquist, J., on motion to recuse).

5 28 U.S.C.A. § 455.
As to disqualification of judges, see §§ 42 to 99.

6 Laird v. Tatum, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972) (per Rehnquist, J., on motion to recuse).

7 Laird v. Tatum, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972) (per Rehnquist, J., on motion to recuse).

8 U.S. Const. Art. VI, cl. 3.

9 28 U.S.C.A. § 453.

10 Lewis v. Green, 629 F. Supp. 546 (D.D.C. 1986).

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§ 26. Prohibition against practice of law by federal judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 21

A.L.R. Library

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886

It is a high misdemeanor for any Justice or judge appointed under the authority of the United States to engage in the practice of law.[1]

The Court of Federal Claims lacks subject matter jurisdiction over claims that certain federal judges illegally engaged in the practice of law.[2]

Footnotes

1 28 U.S.C.A. § 454.
In re Khadr, 823 F.3d 92 (D.C. Cir. 2016).

2 Pikulin v. U.S., 97 Fed. Cl. 71 (2011).

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§ 27. Employment of relatives of federal judges; nepotism

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 21

A person who is related by affinity or consanguinity within the degree of first cousin to any Justice or judge of a court may not be appointed to or employed in any office or duty in such court.[1] A person who is appointed to office in violation of this statutory provision does not hold legal title to such office and is not entitled to the salary or fees attendant to such office.[2] However, if a court of competent jurisdiction refers a matter to a magistrate or master to report, the judge's final judgment is not rendered void by the fact that the magistrate or master is a relative within the prohibited degree of affinity or consanguinity and may not be collaterally attacked, although this irregularity may be brought to the attention of the referring judge.[3]

Footnotes

1 28 U.S.C.A. § 458.

2 Austill v. U.S., 58 Ct. Cl. 232, 1923 WL 2167 (1923).

3 Seaman v. Northwestern Mut. Life Ins. Co., 86 F. 493 (C.C.A. 8th Cir. 1898).

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B. General Statutory Rights and Obligations

§ 28. Power of federal judges to administer oaths and take acknowledgments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24

Each Justice or judge of the United States may administer oaths and affirmations and take acknowledgments.[1] Under this statute, a judge has the power to impose and administer all necessary oaths, including an oath of secrecy on a grand juror.[2]

Footnotes

1 28 U.S.C.A. § 459.

2 Goodman v. U.S., 108 F.2d 516, 127 A.L.R. 265 (C.C.A. 9th Cir. 1939).

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C. Assignment of Federal Judges to Other Courts

§ 29. Assignment of federal circuit judges to other courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Courts 70

The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit.[1] The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.[2]

A chief circuit judge has the power to assign him or herself to a district court.[3] A chief circuit judge is the sole judge of whether the public interest requires a designation, and his or her designation cannot be collaterally attacked by a litigant or overridden by order of the district judges.[4] However, while a chief circuit judge does have the power to intervene in district court proceedings, this power should be sparingly exercised and then only in special situations and with commensurate care and discretion.[5] If a chief circuit judge's action in assigning him or herself to a district court is an embarrassing interference with the conduct of that court's business, the chief judge should exercise his or her sound discretion and withdraw the designation.[6]

A judge from a circuit court of appeals can preside over an evidence suppression hearing, pursuant to an order of the chief circuit court judge authorizing circuit judges to preside over district court matters, even though the regular district court judge handles all other matters associated with the case and there is evidence that the district court judge could preside over the hearing.[7]

Practice Tip:

A request from litigants that a circuit judge be designated to a court out of fear of inability to obtain a fair hearing in the court as currently composed will be rejected, as the circuit justice would not assume, in the absence of statutory disqualification

procedures, that all judges of the circuit are disqualified as a matter of law from hearing the case.[8]

The statute permitting the Chief Justice of the United States to designate and assign temporarily any circuit judge to act as a circuit judge in another circuit provides an inappropriate procedure for providing a quorum for the en banc court of a circuit lacking a quorum to conduct judicial business.[9]

Footnotes

1 28 U.S.C.A. § 291(a).

2 28 U.S.C.A. § 291(b).
As to conditions upon designation and assignment of federal judges to other courts, see § 32.

3 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331 (1933).

4 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331 (1933).

5 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331 (1933).

6 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331 (1933).

7 U.S. v. Girolamo, 23 F.3d 320 (10th Cir. 1994).
As to federal judge's powers while on temporary assignment, see § 33.

8 Meeropol v. Nizer, 429 U.S. 1337, 97 S. Ct. 687, 50 L. Ed. 2d 729 (1977).

9 Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010).

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§ 30. Assignment of federal district judges to other courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Courts 70

The chief judge of the circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.[1] Such designations or assignments must be in conformity with the rules or orders of the court of appeals of that circuit.[2] Further, the chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.[3]

The chief judge of the United States Court of Appeals for the District of Columbia Circuit may, upon presentation of a certificate of necessity by the chief judge of the Superior Court of the District of Columbia pursuant to the District of Columbia Code, designate and assign temporarily any district judge of the circuit to serve as a judge of the superior court if such assignment (1) is approved by the Attorney General of the United States following a determination by him or her to the effect that such assignment is necessary to meet the ends of justice, and (2) is approved by the chief judge of the United States District Court for the District of Columbia.[4]

The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.[5] However, routine over-burdening of a district court does not generally give rise to the necessity for a visiting judge, much less a visiting judge from another circuit; only severe or unexpected over-burdening, as happens when a judge dies or retires, when the district is experiencing a judicial emergency, or when all the judges are recused because of a conflict, will warrant bringing in a visiting judge.[6] The Chief Justice of the United States may designate and assign temporarily any district judge to serve as a judge of the Court of International Trade upon presentation to him or her of a certificate of necessity by the chief judge of the court.[7]

The chief judge of the circuit has broad discretion in determining when there is a need to appoint an out-of-circuit district

court judge and need not conduct a poll of all of the circuit's district judges before issuing a certificate of need.[8] It should be noted that if a district judge is properly designated to hold a district court,[9] he or she can sit on a three-judge court.[10]

Caution:

Litigants have waived the point that a district judge presiding over a trial was improperly designated, either expressly and knowingly,[11] or by failing to raise the matter in the trial court and raising it for the first time on appeal.[12]

Footnotes

1 28 U.S.C.A. § 292(a).
The statute empowering a federal court of appeals chief judge to designate district judges within the circuit for temporary service on the court of appeals does not violate the Appointments Clause, which provides specific procedures for filling Article III judgeships. Washington v. Jarvis, 137 Fed. Appx. 543 (4th Cir. 2005).
A panel of the court of appeals consisting of two Article III judges and one Article IV territorial court judge did not have the authority to decide defendants' appeals as the provisions of the designation statute did not permit the Chief Judge of the Northern Mariana Islands to sit by designation on the Ninth Circuit, since the Chief Judge of the Northern Mariana Islands was not a district judge. Nguyen v. U.S., 539 U.S. 69, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003).

2 28 U.S.C.A. § 292(a).
As to conditions upon designation and assignment of federal judges to other courts, see § 32.

3 28 U.S.C.A. § 292(b).
As to federal judge's powers while on temporary assignment, see § 33.

4 28 U.S.C.A. § 292(c).

5 28 U.S.C.A. § 292(d).
In re Motor Fuel Temperature Sales Practices Litigation, 711 F.3d 1050 (9th Cir. 2013) (discussing procedures adopted under the Guidelines for the Intercircuit Assignment of Article III Judges).

6 In re Motor Fuel Temperature Sales Practices Litigation, 711 F.3d 1050 (9th Cir. 2013).

7 28 U.S.C.A. § 292(e).
As to assignment of judges of Court of International Trade to other Article III courts, see § 31.

8 U.S. v. Claiborne, 870 F.2d 1463 (9th Cir. 1989).

9 28 U.S.C.A. § 292(b).

10 U.S. v. McClellan, 248 F. Supp. 62 (S.D. Miss. 1965).

11 Leary v. U.S., 268 F.2d 623 (9th Cir. 1959).

12 Mitchell v. Snipes, 17 Alaska 173, 245 F.2d 691 (9th Cir. 1957).

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§ 31. Assignment of judges of Court of International Trade to other Article III courts

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West's Key Number Digest

West's Key Number Digest, Courts 70

The Chief Justice may temporarily designate and assign any judge of the Court of International Trade to serve in the court of appeals or in a district court located in any circuit.[1] The chief judge or circuit justice of the circuit must present a certificate of necessity.[2]

Footnotes

1 28 U.S.C.A. § 293(a).

2 28 U.S.C.A. § 293(a).

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§ 32. Conditions upon designation and assignment of federal judges to other courts

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West's Key Number Digest

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No designation and assignment of a circuit or district judge in active service can be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned.[1] No designation and assignment of a judge of any other court of the United States in active service can be made without the consent of the chief judge of such court.[2]

The Chief Justice of the United States, a circuit justice, or a chief judge of a circuit may make new designations and assignments in accordance with the statutory requirements[3] and may revoke those designations and assignments previously made.[4] However, only the above-named judges have the power to revoke a designation and a chief district judge may not do so.[5]

All designations and assignments of justices and judges must be filed with the clerks and entered on the minutes of the courts from and to which the assignments were made.[6]

Footnotes

1 28 U.S.C.A. § 295.

2 28 U.S.C.A. § 295.
In re Motor Fuel Temperature Sales Practices Litigation, 711 F.3d 1050 (9th Cir. 2013) (discussing procedures adopted under the Guidelines for the Intercircuit Assignment of Article III Judges).

3 28 U.S.C.A. §§ 291 et seq.

As to federal judge's powers while on temporary assignment, see § 33.

4 28 U.S.C.A. § 295.

5 Steckel v. Lurie, 185 F.2d 921 (6th Cir. 1950).

6 28 U.S.C.A. § 295.

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§ 33. Federal judge's powers while on temporary assignment

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A justice or judge is required to discharge, during the period of his or her designation and assignment, all judicial duties for which he or she is designated and assigned.[1] The justice or judge may be required to perform any duty which might be required of a judge of the court or district or circuit to which he or she is designated and assigned.[2] A justice or judge has all the powers of a judge of the court, circuit, or district to which he or she is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.[3]

Generally, an assigned judge has only the same powers and rights and must perform the same duties as a resident judge of a district.[4] An assigned judge can hear matters in chambers[5] and may make all orders necessary to protect and preserve the rights of the parties before him or her.[6] A judge on temporary assignment is empowered to impanel one or more grand juries at such times as the public interest requires.[7]

Since the relevant statute makes it the duty of a judge on a temporary assignment to discharge all judicial duties for which he or she is appointed during the time the judge is so appointed,[8] the terms of the designation control the powers of the judge while on temporary assignment, and his or her powers cannot be circumscribed by a later rule promulgated by the district judges in the district where the designated judge is to serve.[9] However, a district judge, who acts beyond the judge's designation by the Chief Justice for an assignment in a district outside the judge's circuit, acts without jurisdiction.[10]

Footnotes

1 28 U.S.C.A. § 296.

As to de facto authority of federal judge while on temporary assignment, see § 34.

2 28 U.S.C.A. § 296.

3 28 U.S.C.A. § 296.

4 In re Associated Gas & Electric Co., 83 F.2d 734 (C.C.A. 2d Cir. 1936).

5 In re American Home Furnishers' Corp., 296 F. 605 (C.C.A. 4th Cir. 1924).

6 Hall v. McKinnon, 193 F. 572, 3 Alaska Fed. 726 (C.C.A. 9th Cir. 1911).

7 U.S. v. Royals, 777 F.2d 1089 (5th Cir. 1985).

8 28 U.S.C.A. § 296.

9 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 53 S. Ct. 721, 77 L. Ed. 1331 (1933).

10 Wrenn v. District of Columbia, 808 F.3d 81 (D.C. Cir. 2015).
As to authority of federal judge after expiration of temporary assignment, see § 35.

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32 Am. Jur. 2d Federal Courts § 34

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II. Judges

C. Assignment of Federal Judges to Other Courts

§ 34. De facto authority of federal judge while on temporary assignment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Courts 70

Even where there may be some question whether a federal judge was properly designated to a temporary assignment, the judge's acts cannot be collaterally attacked on the ground that he or she was without jurisdiction since the courts generally find in such circumstances that the judge was at least a judge de facto.[1] The de facto-judge doctrine is applied when an Article III judge holds court at a time and place fixed by law and performs the regular duties of a judge of that court.[2] The de facto-judge doctrine has been applied in cases where a circuit judge acted as a district judge without a designation[3] and where a judge commenced a trial in a district where he was temporarily assigned one day before the designation became effective.[4] On the other hand, since the courts find a judge's actions to be valid de facto only when there is a "merely technical" defect of statutory authority, the de facto doctrine did not validate the affirmance of convictions by a court of appeals even though the defendants failed to object to the fact that the panel was not constituted in accordance with the designation statute,[5] as the difference between an irregular judicial designation and an impermissible panel designation is the difference between an action which could have been taken, if properly pursued, and one which could never have been taken at all.[6]

Footnotes

1 McDowell v. U.S., 159 U.S. 596, 16 S. Ct. 111, 40 L. Ed. 271 (1895).
As to authority of federal judge after expiration of temporary assignment, see § 35.

2 McDowell v. U.S., 159 U.S. 596, 16 S. Ct. 111, 40 L. Ed. 271 (1895).

3 Luhrig Collieries Co. v. Interstate Coal & Dock Co., 287 F. 711 (C.C.A. 2d Cir. 1923).

4 Leary v. U.S., 268 F.2d 623 (9th Cir. 1959).

[5] 28 U.S.C.A. § 292(a).

[6] Nguyen v. U.S., 539 U.S. 69, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003).
As to federal judge's powers while on temporary assignment, see § 33.

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C. Assignment of Federal Judges to Other Courts

§ 35. Authority of federal judge after expiration of temporary assignment

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West's Key Number Digest

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Any Justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his or her absence from such district or circuit or the expiration of the period of his or her designation and assignment, decide or join in the decision and final disposition of all matters submitted to him or her during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.[1] Thus, a judge temporarily assigned to hold court in another district can sign orders,[2] grant motions for reargument,[3] pass on motions for new trials,[4] impose sentence,[5] and punish for contempt of court[6] in cases he or she heard while on temporary assignment, even if, at the time the judge performs these judicial duties, his or her designation has expired and he or she has returned to his or her home district. Under the statute, it is also proper to provide in a designation that a judge is temporarily appointed to sit for a specified period of time and for such further time as may be required to complete unfinished business, and such an appointment is understood to cover all routine matters arising while the cause is still pending so that the judge is authorized to finish anything arising in a case once he or she has taken jurisdiction over it.[7]

However, once a federal judge's temporary assignment has expired, and he or she has returned to his or her home district, the judge has no jurisdiction to hear new matters in the district where he or she was temporarily assigned, even though those matters might have arisen out of cases he or she heard while on temporary assignment.[8] Cases which the judge heard while on temporary assignment may be reassigned to other judges of that district who have the power to hear the case and enter orders therein.[9]

Footnotes

[1] 28 U.S.C.A. § 296.

As to de facto authority of federal judge while on temporary assignment, see § 34.

[2] Clarke v. Chicago, B. & Q.R. Co., 62 F.2d 440 (C.C.A. 10th Cir. 1932).

[3] U.S. ex rel. Paetau v. Watkins, 164 F.2d 457 (C.C.A. 2d Cir. 1947).

[4] Hicks v. U.S. Shipping Board Emergency Fleet Corporation, 14 F.2d 316 (S.D. N.Y. 1926).

[5] Rachmil v. U.S., 288 F. 782 (C.C.A. 2d Cir. 1923).

[6] Pangborn Corp. v. American Foundry Equipment Co., 159 F.2d 88 (C.C.A. 3d Cir. 1946).

[7] U.S. v. Garsson, 291 F. 646 (S.D. N.Y. 1923).

[8] Frad v. Kelly, 302 U.S. 312, 58 S. Ct. 188, 82 L. Ed. 282 (1937).
As to federal judge's powers while on temporary assignment, see § 33.

[9] Hvass v. Graven, 257 F.2d 1 (8th Cir. 1958).

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II. Judges

D. Disciplinary Proceedings

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Research References

West's Key Number Digest

West's Key Number Digest, Judges 11(1) to 11(8)

A.L.R. Library

A.L.R. Index, Discipline and Disciplinary Actions
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II. Judges

D. Disciplinary Proceedings

§ 36. Complaint of judicial misconduct against federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11(1) to 11(8)

A.L.R. Library

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923

Forms

Forms related to disqualification of judges, generally, see Federal Procedural Forms, Actions in District Court [Westlaw®: Search Query]

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, amended by the Judicial Improvements Act of 2002,[1] is designed to establish a procedure for processing complaints directed against federal judges,[2] allowing any person to file a complaint alleging judicial misconduct against a federal judge.[3] A complaint of judicial misconduct must document conduct by a judge that is wrongful, independent of whether the judge's decision is correct.[4] The overall purpose of the Act is not to punish but to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice.[5] However, the misconduct process cannot be used to second-guess a judge's administrative decision, nor can it result in a reversal of that decision.[6]

Under this Act, any person alleging that a circuit judge, district judge, bankruptcy judge, or magistrate judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.[7] In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons for the order, identify a complaint for purposes of the proceeding and thereby dispense with the filing of a written complaint.[8] The clerk will transmit the complaint to the chief judge of the circuit and to the judge or magistrate whose conduct is the subject of the complaint.[9]

A proceeding under the Act is not a judicial proceeding subject to the Article III requirement of a case or controversy and therefore a complainant under the Act need not satisfy Article III standing requirements in order to maintain a judicial misconduct complaint under the Act.[10]

Practice Tip:

The brief statement of facts required by statute governing complaints of judicial misconduct must be prepared specifically for the misconduct proceeding, although it need not follow a particular form; what matters is that it be concise and set forth the alleged misconduct in a clear and straightforward fashion. Complaints of judicial misconduct that do not comply with the statute or judicial misconduct rules governing such complaints are subject to summary dismissal. Although complainants may attach exhibits to their complaints of judicial misconduct, the exhibits must directly support the allegations of misconduct or disability in the statement of facts.[11]

The phrase, "conduct prejudicial to the effective and expeditious administration of the business of the courts,"[12] admittedly, is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, inappropriate communications,[13] and other abuses of judicial office.[14] A cognizable misconduct complaint based on allegations of a judge not following prevailing law or the directions of a court of appeals in particular cases must identify clear and convincing evidence of willfulness, that is, a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law.[15] Delay is only a proper subject for a judicial misconduct complaint in unusual circumstances, such as where the delay is habitual, is improperly motivated or is the product of improper animus or prejudice toward a particular litigant, or, possibly, where the delay is of such an extraordinary or egregious character as to constitute a clear dereliction of judicial responsibilities.[16] A violation of a Canon of the Code of Conduct for United States judges does not necessarily amount to judicial misconduct under the Judicial Conduct and Disability Act.[17]

Judges have the duty to report judicial misconduct, and the chief judge may investigate potential misconduct sua sponte.[18] Serious misbehavior by federal judges is handled through the impeachment process.[19]

Practice Tip:

A complaint of judicial misconduct is a court filing and therefore is subject to normal constraints on such filings, including the requirement that it conform to procedural rules governing format and content,[20] and the requirement of good faith and a proper factual foundation; failure to observe these basic requirements of proper pleading may subject a complainant to sanctions.[21] While sanctions against a judicial misconduct complainant will seldom be considered after a single complaint by someone who is not a lawyer,[22] a pattern of filing frivolous and vexatious misconduct complaints may result in the imposition of a "leave-to-file" requirement under which the complainant will not be permitted to file any subsequent judicial misconduct complaint without first obtaining leave to file from the chief judge.[23]

Footnotes

[1] 28 U.S.C.A. §§ 351 to 364.

[2] In re Complaint of Judicial Misconduct, 366 F.3d 963 (9th Cir. 2004).

[3] In re Complaint of Judicial Misconduct, 575 F.3d 279 (3d Cir. 2009).

[4] In re Judicial Misconduct, 726 F.3d 1060 (9th Cir. 2013).

[5] In re Complaint of Judicial Misconduct, 425 F.3d 1179 (9th Cir. Jud. Council 2005).

[6] In re Judicial Misconduct, 726 F.3d 1060 (9th Cir. 2013).
As to review by chief judge and dismissal of complaint of judicial misconduct, see § 37.

[7] 28 U.S.C.A. § 351(a).

[8] 28 U.S.C.A. § 351(b).

[9] 28 U.S.C.A. § 351(c); U.S. v. Gagan, 95 Fed. Appx. 941 (10th Cir. 2004).

[10] In re Complaints of Judicial Misconduct, 9 F.3d 1562 (U.S. Jud. Conf. 1993).

[11] In re Complaint of Judicial Misconduct, 630 F.3d 968 (9th Cir. Jud. Council 2010).

[12] 28 U.S.C.A. § 351(a).

[13] In re Judicial Misconduct, 751 F.3d 611 (U.S. Jud. Conf. 2014).

[14] In re Judicial Misconduct, 664 F.3d 332 (U.S. Jud. Conf. 2011) (membership in a private social club which practiced invidious discrimination against women and African Americans); In re Complaint of Judicial Misconduct, 366 F.3d 963 (9th Cir. 2004).

[15] In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558 (U.S. Jud. Conf. 2008); In re Judicial Misconduct, 631 F.3d 961 (9th Cir. Jud. Council 2011).

[16] In re Judicial Misconduct, 579 F.3d 1062 (9th Cir. 2009).

[17] In re Complaint of Judicial Misconduct, 575 F.3d 279 (3d Cir. 2009).

[18] In re Judicial Misconduct, 605 F.3d 1060 (9th Cir. 2010).

[19] Bryan v. Murphy, 243 F. Supp. 2d 1375 (N.D. Ga. 2003).
As to impeachment and removal from office of Article III judges, see § 21.

[20] In re Complaint of Judicial Misconduct, 630 F.3d 968 (9th Cir. Jud. Council 2010).

[21] In re Judicial Misconduct, 527 F.3d 792 (9th Cir. Jud. Council 2008), order aff'd, 550 F.3d 769 (9th Cir. 2008).

[22] In re Judicial Misconduct, 579 F.3d 1062 (9th Cir. 2009).

[23] In re Sassower, 20 F.3d 42 (2d Cir. Jud. Council 1994).

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II. Judges

D. Disciplinary Proceedings

§ 37. Review of complaint of judicial misconduct against federal judge by chief judge; limited inquiry; dismissal of complaint

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11(4), 11(5.1), 11(7), 11(8)

The chief judge must expeditiously review any complaint received or identified.[1] In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining: (1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation, and (2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation.[2] For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint.[3] Such response must not be made available to the complainant unless authorized by the judge filing the response.[4] The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the matter and may review any transcripts or other relevant documents.[5] The chief judge may not undertake to make findings of fact about any matter that is reasonably in dispute.[6]

Observation:

The filing of a judicial complaint does not necessarily result in an investigation, nor does the nondismissal of a complaint mean an investigation is pending.[7]

After expeditiously reviewing a complaint, the chief judge, by written order stating his or her reasons, may dismiss the

complaint or conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.[8] The chief judge may dismiss the complaint if the chief judge finds the complaint to be (1) not in conformity with statutory requirements; (2) directly related to the merits of a decision or procedural ruling;[9] or (3) frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred,[10] or containing allegations which are incapable of being established through investigation.[11] The chief judge may also dismiss the complaint when a limited inquiry conducted under the statute[12] demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence.[13] Judicial misconduct complaints that do not allege behavior that is prejudicial to the effective and expeditious administration of the business of the courts must be dismissed.[14] General or vague accusations[15] and convoluted demands do not satisfy a complainant's obligation to provide objectively verifiable proof, such as names of witnesses, recorded documents, or transcripts[16] of judicial misconduct.[17]

The Judicial Conduct and Disability Act does not encompass complaints relating to the merits of any decision or procedural ruling of a judge nor to any matter reviewable under any other provision of law on the record.[18] Adverse rulings, standing alone, are not proof of judicial misconduct.[19] A single reversal, or even a handful of reversals, does not prove judicial misconduct, as required to avoid a merits-related bar; the number of erroneous rulings must be large enough that it could constitute a pattern and the misconduct complainant also must present clear and convincing evidence that this series of erroneous rulings reflects the judge's virtually habitual, arbitrary and intentional departure from prevailing law based on the judge's disagreement with, or willful indifference to, that law.[20] Although allegations of judicial bias, collusion with a party, or other improper motive are not necessarily merits-related, as would preclude review by the judicial council, such allegations must be dismissed as merits-related when the only support for the allegation of bad acts or motive is the merits of the judge's rulings.[21] Similarly, a judicial remedy is available to deal with a claim that a judge should have disqualified him or herself under the general disqualification statute[22] and therefore such an allegation is not a proper subject of complaint of judicial misconduct.[23] A failure to recuse may constitute judicial misconduct only if the judge failed to recuse for an improper purpose.[24]

The chief judge is required to transmit copies of the written order to the complainant and to the judge whose conduct is the subject of the complaint.[25]

Footnotes

1 28 U.S.C.A. § 352(a).
As to complaint of judicial misconduct against federal judge, see § 36.

2 28 U.S.C.A. § 352(a).
The limited inquiry should never be confused with an investigation into misconduct. In re Evergreen Sec., Ltd., 384 B.R. 882 (Bankr. M.D. Fla. 2008), order aff'd, 391 B.R. 184 (M.D. Fla. 2008), decision aff'd, 570 F.3d 1257 (11th Cir. 2009).
As to referral to and action of special committee and judicial council and investigation, see § 38.

3 28 U.S.C.A. § 352(a).
In re Complaint of Judicial Misconduct, 567 F.3d 429 (9th Cir. 2009).

4 28 U.S.C.A. § 352(a).

5 28 U.S.C.A. § 352(a).

6 28 U.S.C.A. § 352(a).

7 In re Evergreen Sec., Ltd., 384 B.R. 882 (Bankr. M.D. Fla. 2008), order aff'd, 391 B.R. 184 (M.D. Fla. 2008), decision aff'd, 570 F.3d 1257 (11th Cir. 2009).

8 28 U.S.C.A. § 352(b)(1), (2); In re Judicial Misconduct, 751 F.3d 611 (U.S. Jud. Conf. 2014) (district judge's retirement after Judicial Council issued an order finding disciplinary violations, publicly reprimanding the judge, and ordering various remedial measures, was not an "intervening event"); In re Complaint of Judicial Misconduct, 10 F.3d 99 (3d Cir. Jud. Council 1993), review denied, order aff'd, (Jan. 14, 1994) (judge's retirement moots complaint of

judicial misconduct).

9 In re Judicial Misconduct, 579 F.3d 1062 (9th Cir. 2009).

10 In re Doe, 642 F.3d 663 (8th Cir. Jud. Council 2011); In re Judicial Misconduct, 527 F.3d 792 (9th Cir. Jud. Council 2008), order aff'd, 550 F.3d 769 (9th Cir. 2008).

11 28 U.S.C.A. § 352(b)(1)(A).
In re Complaint of Judicial Misconduct, 828 F.3d 1179 (9th Cir. Jud. Council 2016); In re Judicial Misconduct, 605 F.3d 1060 (9th Cir. 2010).

12 28 U.S.C.A. § 352(a).

13 28 U.S.C.A. § 352(b)(1)(B).

14 In re Complaint of Judicial Misconduct, 816 F.3d 1266 (9th Cir. Jud. Council 2016); In re Complaint of Judicial Misconduct, 366 F.3d 963 (9th Cir. 2004) (routine personnel decisions involving court employees).

15 In re Charges of Judicial Misconduct, 404 F.3d 688 (2d Cir. Jud. Council 2005).

16 In re Judicial Misconduct, 579 F.3d 1062 (9th Cir. 2009); In re Judicial Misconduct, 527 F.3d 792 (9th Cir. Jud. Council 2008), order aff'd, 550 F.3d 769 (9th Cir. 2008).

17 In re Complaint of Judicial Misconduct, 650 F.3d 1370 (9th Cir. Jud. Council 2011).

18 In re Doe, 642 F.3d 663 (8th Cir. Jud. Council 2011); In re Complaint of Judicial Misconduct, 552 F.3d 1146 (9th Cir. Jud. Council 2009).

19 In re Complaint of Judicial Misconduct, 715 F.3d 747 (9th Cir. 2013).

20 In re Judicial Misconduct, 631 F.3d 961 (9th Cir. Jud. Council 2011).

21 In re Doe, 640 F.3d 869 (8th Cir. Jud. Council 2011).

22 28 U.S.C.A. § 455.

23 In re Charge of Judicial Misconduct, 691 F.2d 924 (9th Cir. Jud. Council 1982).

24 In re Judicial Misconduct, 605 F.3d 1060 (9th Cir. 2010).

25 28 U.S.C.A. § 352(b).

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II. Judges

D. Disciplinary Proceedings

§ 38. Referral of complaint of judicial misconduct to and action of special committee and judicial council

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11(5.1), 11(8)

If the chief judge does not enter an order dismissing the complaint or terminating any action thereon,[1] the chief judge must promptly (1) appoint him or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint,[2] (2) certify the complaint and any other documents pertaining thereto to each member of such committee, and (3) provide written notice to the complainant and the judge whose conduct is the subject of the complaint of the action taken.[3] A special committee is required to conduct an investigation as extensive as it considers necessary and must expeditiously file a comprehensive written report thereon with the judicial council of the circuit.[4] This report must present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.[5] In conducting any authorized investigation, a special committee or judicial council has full subpoena powers.[6]

Observation:

In proceedings under the Judicial Conduct and Disability Act, a chief judge may identify a complaint of misconduct and, having done so, serve as chair of the judicial council that reviews the complaint and chair of the special committee making recommendations to the judicial council; the fact that the judge has prior, even intimate, knowledge of the subject matter of the complaint, and has even formulated an opinion of the subject judge's conduct is of no moment.[7] There is no constitutional violation in judges serving on a committee investigating complaints against judges and magistrates who are accused of engaging in conduct prejudicial to the effective and expeditious administration of the business of the courts as judges' administrative and investigatory activities, limited to consideration of their own conduct and efficiency, are not "executive" simply because they are nonadjudicative in character.[8]

Upon receipt of the report of a special committee, the judicial council may conduct any additional investigation which it considers to be necessary.[9] The judicial council may also dismiss the complaint,[10] and if the complaint is not dismissed, it must take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.[11] The Judicial Council is not a court and thus cannot determine whether a judge's rulings are erroneous.[12]

Generally, deference is given to a judicial council's judgment with respect to an appropriate sanction so long as the council has fully considered all the relevant options.[13] Action by the judicial council to assure the effective and expeditious administration of the business of the courts may include (1) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;[14] (2) censuring or reprimanding such judge by means of private communication; and (3) censuring or reprimanding such judge by means of public announcement.[15] If the conduct of an Article III judge is the subject of the complaint, action by the judicial council may include (1) certifying disability of the judge[16] pursuant to statutory procedures and standards; and (2) requesting that the judge voluntarily retire, with the provision that the length of service requirements[17] not apply.[18] If the conduct of a magistrate judge is the subject of the complaint, action by the judicial council may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.[19] However, a judicial council may not remove an Article III judge from office and may not remove a bankruptcy judge or magistrate except in accordance with the pertinent provisions of the Bankruptcy Reform Act and Magistrates' Act.[20] The council must immediately provide written notice to the complainant and to the judge or magistrate of any action taken by it.[21]

Footnotes

1 28 U.S.C.A. § 352(b).
As to review by chief judge and dismissal of complaint of judicial misconduct, see § 37.

2 In re Evergreen Sec., Ltd., 384 B.R. 882 (Bankr. M.D. Fla. 2008), order aff'd, 391 B.R. 184 (M.D. Fla. 2008), decision aff'd, 570 F.3d 1257 (11th Cir. 2009).

3 28 U.S.C.A. § 353(a).

4 28 U.S.C.A. § 353(c).

5 28 U.S.C.A. § 353(c).

6 28 U.S.C.A. § 356(a).

7 In re Complaint of Judicial Misconduct, 591 F.3d 638 (U.S. Jud. Conf. 2009).

8 Matter of Certain Complaints Under Investigation by an Investigating Committee of Judicial Council of Eleventh Circuit, 783 F.2d 1488, 19 Fed. R. Evid. Serv. 1279 (11th Cir. 1986).

9 28 U.S.C.A. § 354(a)(1)(A).

10 28 U.S.C.A. § 354(a)(1)(B).
In re Complaint of Judicial Misconduct, 640 F.3d 354 (U.S. Jud. Conf. 2010); In re Complaint of Judicial Misconduct, 591 F.3d 638 (U.S. Jud. Conf. 2009).

11 28 U.S.C.A. § 354(a)(1)(C).

12 In re U.S., 791 F.3d 945 (9th Cir. 2015).

13 In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 563 (U.S. Jud. Conf. 2008).
As to review of decision of chief judge or judicial council, see § 41.

14 In re Judicial Misconduct, 751 F.3d 611 (U.S. Jud. Conf. 2014); Danos v. Jones, 721 F. Supp. 2d 491 (E.D. La. 2010), aff'd, 652 F.3d 577 (5th Cir. 2011).

15 28 U.S.C.A. § 354(a)(2)(A).
In re Judicial Misconduct, 664 F.3d 332 (U.S. Jud. Conf. 2011) (public reprimand); In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 563 (U.S. Jud. Conf. 2008) (public reprimand); In re Complaint of Judicial Misconduct, 575 F.3d 279 (3d Cir. 2009).

16 28 U.S.C.A. § 372(b).

17 28 U.S.C.A. § 371.

18 28 U.S.C.A. § 354(a)(2)(B).

19 28 U.S.C.A. § 354(a)(2)(C).

20 28 U.S.C.A. § 354(a)(3).
As to removal of magistrates, see § 119.
As to removal of bankruptcy judges, see Am. Jur. 2d, Bankruptcy § 427.

21 28 U.S.C.A. § 354(a)(4).

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32 Am. Jur. 2d Federal Courts § 39

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II. Judges

D. Disciplinary Proceedings

§ 39. Referral of complaint of judicial misconduct to Judicial Conference of United States

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11(4), 11(5.1), 11(8)

A judicial council may, in its discretion, refer any complaint, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.[1] Furthermore, in any case where the judicial council determines that a judge may have engaged in conduct which might constitute an impeachable offense or which is not amendable to resolution by the judicial council, it must promptly certify such determination to the Judicial Conference.[2]

Observation:

The chief judge and judicial counsel of a given circuit, not the Judicial Conference, are charged with enforcing judicial ethics. The limited role of the Judicial Conference in judicial discipline includes cases of impeachment, and appellate review of the actions of circuit judicial councils.[3]

If a complaint is referred to the Judicial Conference of the United States, the Judicial Conference will consider the prior proceedings and may also investigate the matter and by majority vote will take such action as it deems appropriate.[4] In conducting any authorized investigation the Judicial Conference has full subpoena powers.[5] If the Conference determines that the consideration of impeachment may be warranted, it must so certify and transmit this determination and the record of the proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.[6] If a

judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or if the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification,[7] transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.[8] Upon receipt of the determination and record of proceedings in the House of Representatives, the clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.[9]

Footnotes

1 28 U.S.C.A. § 354(b)(1).

2 28 U.S.C.A. § 354(b)(2).

3 Landrith v. Roberts, 999 F. Supp. 2d 8 (D.D.C. 2013), aff'd, 2014 WL 3014730 (D.C. Cir. 2014).
As to review of decision of judicial council, see § 41.

4 28 U.S.C.A. § 355(a).

5 28 U.S.C.A. § 356(b).

6 28 U.S.C.A. § 355(b)(1).

7 28 U.S.C.A. § 354(b).

8 28 U.S.C.A. § 355(b)(2).

9 28 U.S.C.A. § 355(b)(1).

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II. Judges

D. Disciplinary Proceedings

§ 40. Rules and procedure for proceedings of judicial misconduct

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11(5.1) to 11(8)

Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under the Judicial Conduct and Disability Act, including the processing of petitions for review, as each considers to be appropriate.[1] These rules must contain provisions requiring that:

(1) adequate prior notice of any investigation be given in writing to the judge whose conduct is the subject of a complaint;

(2) the judge whose conduct is the subject of a complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(3) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel if the panel concludes that the complainant could offer substantial information.[2]

Any rule prescribed must be made or amended only after giving appropriate public notice and an opportunity for comment.[3] Any such rule must be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference.[4] No rule may limit the period of time within which a person may file a complaint.[5]

No judge whose conduct is the subject of an investigation can serve upon a special committee, upon a judicial council, or upon the Judicial Conference or its standing committee until all proceedings relating to such investigation have been finally terminated.[6] In the case of any judge who is convicted of a felony under state or federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the judge may not hear or decide cases unless the judicial council of the circuit determines otherwise.[7]

No person will be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference.[8]

Except if impeachment is warranted,[9] all papers, documents, and records of proceedings related to investigations are confidential[10] and must not be disclosed by any person in any proceeding except to the extent that:

(1) the judicial council of the circuit in its discretion releases a copy of a report of a special committee to the complainant whose complaint initiated the investigation by that special committee and to the judge whose conduct is the subject of the complaint;

(2) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under Article I of the Constitution; or
(3) such disclosure is authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of a standing committee.[11]

A judicial council does not abuse its discretion in disclosing the identity of a judge who was the subject of a judicial complaint that was dismissed based on an "intervening event" of the judge's retirement, or in referring the complaint to the Department of Justice, where the judge resigned during the course of the investigation.[12]

Observation:

Journalists did not have a qualified First Amendment right of access to a judge's e-mails, which formed the basis of a disciplinary proceeding against him.[13]

Each written order to implement any action[14] which is issued by a judicial council, the Judicial Conference, or a standing committee, is required to be made available to the public through the appropriate clerk's office of the court of appeals for the circuit.[15] Unless contrary to the interests of justice, each such order must be accompanied by written reasons therefor.[16]

Practice Tip:

Filing of a confidential judicial misconduct complaint with the court of appeals does not entitle the complainant to a stay of further proceedings before the judge whose conduct is the subject of the complaint.[17]

The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this chapter.[18]

Footnotes

[1] 28 U.S.C.A. § 358(a).
In re Judicial Misconduct, 751 F.3d 611 (U.S. Jud. Conf. 2014); In re Complaint of Judicial Misconduct, 575 F.3d 279

(3d Cir. 2009).

2 28 U.S.C.A. § 358(b).

3 28 U.S.C.A. § 358(c).

4 28 U.S.C.A. § 358(c).

5 28 U.S.C.A. § 358(c).

6 28 U.S.C.A. § 359(a).

7 28 U.S.C.A. § 364(1).

8 28 U.S.C.A. § 359(b).

9 28 U.S.C.A. § 355(b).

10 In re Evergreen Sec., Ltd., 384 B.R. 882 (Bankr. M.D. Fla. 2008), order aff'd, 391 B.R. 184 (M.D. Fla. 2008), decision aff'd, 570 F.3d 1257 (11th Cir. 2009).

11 28 U.S.C.A. § 360(a).

12 In re Judicial Misconduct, 747 F.3d 869 (U.S. Jud. Conf. 2014).
As to review by chief judge and dismissal of complaint of judicial misconduct, see § 37.

13 Adams v. Committee on Judicial Conduct & Disability, 165 F. Supp. 3d 911 (N.D. Cal. 2016), judgment entered, (9th Cir. 16-15529) 2016 WL 738557 (N.D. Cal. 2016) and appeal dismissed, (9th Cir. 16-15529) (Aug. 31, 2016).

14 28 U.S.C.A. § 354(a)(1)(C).

15 28 U.S.C.A. § 360(b).
The publication requirement balances the need to preserve the confidentiality of the identity of a federal judge who is subject to a complaint with the need for transparency and public confidence. In re Judicial Misconduct, 751 F.3d 611 (U.S. Jud. Conf. 2014).

16 28 U.S.C.A. § 360(b).

17 In re Kozich, 534 B.R. 427 (Bankr. S.D. Fla. 2015).

18 28 U.S.C.A. § 363.

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II. Judges

D. Disciplinary Proceedings

§ 41. Review of decision of chief judge or judicial council pertaining to complaint of judicial misconduct

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11(8)

A complainant or judge aggrieved by a final order of the chief judge may petition the judicial council of the circuit for review of the order,[1] and each judicial council may refer a petition for review to a panel of no fewer than five members of the council, at least two of whom are district judges.[2] The denial of a petition for review of the chief judge's order is final and conclusive and is not be judicially reviewable on appeal or otherwise.[3]

A complainant or judge aggrieved by an action of the judicial council may petition the Judicial Conference of the United States for review of the action.[4] Except as expressly provided, all orders and determinations, including denials of petitions for review, are final and conclusive and are not be judicially reviewable on appeal or otherwise.[5] The finality clause of the Judicial Conduct and Disability Act,[6] bars statutory claims asserted by a judge sanctioned pursuant to the Act, as well as any as-applied challenge to the constitutionality of the Act, but does not bar the judge's challenge to the Act as allegedly unconstitutional on its face, as impermissibly impairing his judicial independence and violating separation of powers.[7]

In reviewing the actions of the judicial council, the Judicial Conference of the United States Committee on Judicial Conduct and Disability defers to the council's findings, overturning them only if they are clearly erroneous.[8] Deference is also generally given to a judicial council's judgment with respect to an appropriate sanction so long as the council has fully considered all the relevant options.[9]

Footnotes

[1] 28 U.S.C.A. § 352(c).

[2] 28 U.S.C.A. § 352(d).

[3] 28 U.S.C.A. § 352(c).

[4] 28 U.S.C.A. § 357(a); In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 52 A.L.R. Fed. 2d 619 (U.S. Jud. Conf. 2006).
As to referral of complaint of judicial misconduct to Judicial Conference of United States, see § 39.

[5] 28 U.S.C.A. § 357(c); Overton v. Torruella, 183 F. Supp. 2d 295 (D. Mass. 2001).

[6] 28 U.S.C.A. § 357(c).

[7] McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of U.S., 264 F.3d 52 (D.C. Cir. 2001).

[8] In re Judicial Misconduct, 664 F.3d 332 (U.S. Jud. Conf. 2011); In re Complaint of Judicial Misconduct, 640 F.3d 354 (U.S. Jud. Conf. 2010).

[9] In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 563 (U.S. Jud. Conf. 2008).
As to referral to and action of judicial council, see § 38.

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II. Judges

E. Disqualification and Recusal of Judges

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Research References

West's Key Number Digest

West's Key Number Digest, Courts 70

West's Key Number Digest, Federal Courts 3275, 3319(1), 3319(2), 3391, 3546(2), 3594
West's Key Number Digest, Judges 39 to 54
West's Key Number Digest, Mandamus 29

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A.L.R. Index, Bias or Prejudice
A.L.R. Index, Financial Interest and Benefit
A.L.R. Index, Judges
A.L.R. Index, Qualification or Disqualification
A.L.R. Index, Recusal
West's A.L.R. Digest, Courts 70
West's A.L.R. Digest, Federal Courts 3275, 3319(1), 3319(2), 3391, 3546(2), 3594
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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

a. Overview

§ 42. Purpose of recusal or disqualification of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Forms

Forms relating to federal judge disqualification, generally, see Federal Procedural Forms, Criminal Procedure; Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw® Search Query]

Public confidence in the judicial system mandates, at a minimum, the appearance of neutrality and impartiality in the administration of justice.[1] Recusal is necessary when a judge's actions or comments reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.[2]

However, a disqualification decision must reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.[3] Thus, a court should not allow the recusal of a judge to be used as a vehicle for a party to pick and choose the judge who will preside over the case,[4] nor should recusal be used to protest court orders, circumvent court procedures with which litigants disagree,[5] or avoid the consequences of an expected adverse decision.[6] Neither the statute governing bias or prejudice of a district court judge[7] nor the statute governing disqualification of judges[8] provides a basis for recusal where a party is simply displeased with the court's legal rulings.[9] A motion to recuse is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice.[10] The statute governing disqualification of judges implicates competing policy interests: on the one hand, courts must not only be, but must seem to be, free of bias or prejudice, on the other hand, recusal on demand would put too large a club in the hands of litigants and lawyers, enabling them to veto the assignment of judges for no good reason.[11] Generally, disqualification of a judge should be viewed as an extraordinary occurrence.[12]

A federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.[13] Although a judge must recuse himself from any proceeding in which any of the statutory criteria apply, he or she must not simply recuse out of an abundance of caution when the facts do not warrant recusal and there is no objective basis for recusal;[14] rather, there is an equally compelling obligation not to recuse where recusal in not appropriate.[15] Disability, mental or physical, is not a proper basis for seeking a judge's recusal.[16] It is vital to the integrity of the system of justice that a judge not recuse him or herself on unsupported, irrational or highly tenuous speculation.[17]

Recusal of a judge in one proceeding of a case does not necessarily require recusal in every proceeding of that case; rather, in the appropriate instance, partial recusal serves the interests of case management and judicial economy.[18] On the other hand, a trial judge cannot, without explanation, recuse him or herself in a substantial number of cases and, at the same time, decline to recuse him or herself in another group of cases that appears indistinguishable for purposes of recusal.[19]

Footnotes

1 Khadr v. U.S., 62 F. Supp. 3d 1314 (U.S.C.M.C.R. 2014); Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).
As to applicability of statutory impartiality requirement for federal judges, see § 58.

2 U.S. v. Nickl, 427 F.3d 1286, 68 Fed. R. Evid. Serv. 837 (10th Cir. 2005).

3 In re U.S., 441 F.3d 44 (1st Cir. 2006).

4 U.S. v. Dehghani, 550 F.3d 716 (8th Cir. 2008); U.S. v. Rhodes, 332 F. Supp. 2d 965 (N.D. Tex. 2004).

5 U.S. v. Cooper, 283 F. Supp. 2d 1215 (D. Kan. 2003).

6 In re Owens Corning, 305 B.R. 175 (D. Del. 2004).

7 28 U.S.C.A. § 144.

8 28 U.S.C.A. § 455.

9 Alston v. Administrative Offices of Delaware Courts, 178 F. Supp. 3d 222 (D. Del. 2016), aff'd, 663 Fed. Appx. 105 (3d Cir. 2016).
As to disqualification and recusal statutes, see § 43.

10 White v. National Football League, 585 F.3d 1129, 74 Fed. R. Serv. 3d 1615 (8th Cir. 2009).

11 Rodriguez-Vilanova v. Stryker Corp., 987 F. Supp. 2d 153 (D.P.R. 2013).

12 In re Stoller, 374 B.R. 618 (Bankr. N.D. Ill. 2007).

[13] Rodriguez-Vilanova v. Stryker Corp., 987 F. Supp. 2d 153 (D.P.R. 2013).

[14] Fideicomiso De La Tierra del Cano Martin Pena v. Fortuno, 631 F. Supp. 2d 134 (D.P.R. 2009).

[15] U.S. v. Sierra Pacific Industries, 759 F. Supp. 2d 1198 (E.D. Cal. 2010).

[16] Inland Concrete Enterprises, Inc. v. Kraft, 318 F.R.D. 383 (C.D. Cal. 2016).
As to the statutory grounds for disqualification, see §§ 58 to 99.
As to retirement due to disability, see § 101.

[17] Cooney v. Booth, 262 F. Supp. 2d 494 (E.D. Pa. 2003), aff'd, 108 Fed. Appx. 739 (3d Cir. 2004); United States v. Quinones, 201 F. Supp. 3d 789 (S.D. W. Va. 2016).

[18] Ellis v. U.S., 313 F.3d 636 (1st Cir. 2002); Decker v. GE Healthcare Inc., 770 F.3d 378 (6th Cir. 2014).

[19] Selkridge v. United of Omaha Life Ins. Co., 45 V.I. 712, 360 F.3d 155 (3d Cir. 2004).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

a. Overview

§ 43. Statutory basis for disqualification and recusal of federal judge; constitutionality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

Disqualification of Federal Judge Under 28 U.S.C.A. s455(b)(3), Providing for Disqualification of Judges Who Formerly Served in Government, 34 A.L.R. Fed. 2d 589

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Forms

Forms relating to disqualification of federal judges, generally, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw® Search Query]

By statute, a judge must disqualify him or herself from hearing a particular case if a statutory ground for disqualification exists.[1] The general disqualification statute governs the disqualification of all justices, judges, and magistrates of the United States.[2] Another statute, which requires the disqualification of a judge upon the presentation of an affidavit of bias or prejudice,[3] applies by its own terms only to district court judges.[4]

Observation:

The language of the general disqualification statute[5] conforms with the American Bar Association Code of Judicial Conduct,[6] and is similar to the language of the Code of Judicial Conduct.[7]

The scope of inquiry under the statute governing the disqualification of a judge[8] is limited to outward manifestations and reasonable inferences drawn therefrom.[9] To have a cause to recuse, a judge must have actual knowledge of the alleged grounds for recusal.[10]

Because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard, most questions concerning a judge's qualifications to hear a case are not constitutional ones.[11] Further, freedom of speech protected by the First Amendment does not mean that there can be no limitations such as those contemplated under the statute providing that any justice, judge, or magistrate judge of the United States shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned, much less on where he or she can say it, especially as it relates to pending litigation.[12]

Footnotes

1 28 U.S.C.A. §§ 144, 455.
As to the statutory grounds for disqualification, see §§ 58 to 99.
As to disqualification issues peculiar to judges or justices of particular federal courts, see §§ 456, 516, 538.
As to the applicability of 28 U.S.C.A. § 455 to bankruptcy judges, see Am. Jur. 2d, Bankruptcy §§ 428 to 439.

2 28 U.S.C.A. § 455.
As to definition of justice and judge, see § 24.

3 28 U.S.C.A. § 144.

4 Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016) (statute does not apply to bankruptcy judges).

5 28 U.S.C.A. § 455.

6 U.S. v. Ritter, 540 F.2d 459 (10th Cir. 1976).

7 In re Virginia Elec. & Power Co., 539 F.2d 357 (4th Cir. 1976).

[8] 28 U.S.C.A. § 455.

[9] In re McCarthey, 368 F.3d 1266 (10th Cir. 2004).
As to determination of motion to disqualify or recuse federal judge and presumptions and burden of proof, see §§ 50, 51.

[10] U.S. v. Vampire Nation, 451 F.3d 189 (3d Cir. 2006).

[11] Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008); Date v. Schriro, 619 F. Supp. 2d 736 (D. Ariz. 2008).

[12] Ligon v. City of New York, 736 F.3d 166, 86 Fed. R. Serv. 3d 1565 (2d Cir. 2013).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

a. Overview

§ 44. Who may seek disqualification of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

The term "proceeding" in the general disqualification statute[1] includes only such activity following the initiation of an action by a private party or governmental agency which is designed ultimately to modify or affect the substantive rights of a litigant,[2] including pretrial, trial, appellate review, or other stages of litigation.[3] The general disqualification statute does not confer standing upon nonparty witnesses who have not been adjudged in contempt to challenge the impartiality of a federal judge.[4]

Once leave to intervene has been granted to a party, even if on a limited basis, the intervenor has the right to apply for disqualification of the judge.[5]

The statute governing disqualification of a judge (28 U.S.C.A. § 455) places the judge under a self-enforcing obligation to recuse him or herself where the proper legal grounds exist.[6] Despite the duty to sit, a judge may always recuse himself sua sponte from a matter.[7]

Observation:

In filing a motion for recusal of a federal trial judge, a criminal defendant is not opposing the judge, but is defending his case; in filing a response, the government is not defending the judge, but rather is prosecuting the case.[8]

Footnotes

1 28 U.S.C.A. § 455(a).

2 U.S. v. Sciarra, 851 F.2d 621, 12 Fed. R. Serv. 3d 249 (3d Cir. 1988).

3 28 U.S.C.A. § 455(d)(1).

4 U.S. v. Sciarra, 851 F.2d 621, 12 Fed. R. Serv. 3d 249 (3d Cir. 1988).

5 U.S. v. South Florida Water Management Dist., 290 F. Supp. 2d 1356 (S.D. Fla. 2003).

6 In re McCarthey, 368 F.3d 1266 (10th Cir. 2004).

7 U.S. v. Holland, 519 F.3d 909 (9th Cir. 2008).
As to purpose of recusal or disqualification of federal judge, see § 42.

8 U.S. v. Corbin, 827 F. Supp. 2d 26 (D. Me. 2011).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

a. Overview

§ 45. Effect of disqualification of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

Forms

Forms relating to disqualification of federal judges, generally, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw® Search Query]

A judge who is disqualified under the general disqualification statute is barred from thereafter participating in any part of the proceeding, including pretrial, trial, appellate review, or any other stage of the proceeding.[1] However, even after grounds for judicial recusal emerge, a disqualified judge still may enter "housekeeping" orders that do not involve the exercise of judicial discretion.[2] If orders or findings other than housekeeping orders are made, they may be vacated,[3] and a party may seek and obtain a writ of mandamus for this purpose.[4] Once a judge has disqualified him or herself, that judge cannot resume control over the case.[5]

When the chief judge of a district is disqualified under the general disqualification statute,[6] the chief judge should not be the one to assign the case to another judge, since this would violate the statutory command that the disqualified judge be removed from all participation in the case and, in addition, might create suspicion that the disqualified judge will select a successor whose views are consonant with his or her own.[7]

Footnotes

1 28 U.S.C.A. § 455(d)(1).

2 In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003).

3 Orders entered prior to recusal may be voided if the injured party can show that the judge should have recused him/herself and failed to do so. In re Armstrong, 294 B.R. 344 (B.A.P. 10th Cir. 2003), aff'd, 97 Fed. Appx. 285 (10th Cir. 2004).

4 Moody v. Simmons, 858 F.2d 137 (3d Cir. 1988).

5 Stringer v. U.S., 16 Alaska 305, 233 F.2d 947 (9th Cir. 1956).

6 28 U.S.C.A. § 455.

7 McCuin v. Texas Power & Light Co., 714 F.2d 1255, 32 Fed. R. Serv. 2d 1575, 73 A.L.R. Fed. 863 (5th Cir. 1983).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

a. Overview

§ 46. Rule of necessity pertaining to disqualification of federal judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise, 27 A.L.R.6th 403

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Forms

Forms relating to rule of necessity, generally, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw® Search Query]

Pursuant to the rule of necessity, a judge is not disqualified to try a case because of a personal interest in the matter at issue if the case cannot be heard otherwise.[1] The ancient rule of necessity prevails as an exception[2] over the disqualification standards of the general disqualification statute,[3] and applies when all judges apparently have an interest in the outcome of a case so that the assignment of a substitute judge is impossible.[4] The rule of necessity is applied in cases where it appears that all judges might be disqualified,[5] and if all are arguably disqualified, then none is disqualified.[6]

A plaintiff cannot sue all of the judges in a particular district and thus have the case transferred out of the district, and if disqualification operates so as to bar justice to the parties and no other tribunal is available, the disqualified judge or judges may by necessity proceed to judgment.[7] In such a situation, the disqualification statutes cannot be applied, because a defendant could deliberately decide to disqualify a large number of judges by naming them as defendants in the action.[8] The existence of qualified judges in other circuits does not undercut the applicability of the rule of necessity, and does not require transferring the case to another court, where an appellant indiscriminately names all the judges on a court as defendants or the court itself as a defendant.[9]

Footnotes

1 Haase v. Countrywide Home Loans, Incorporated, 838 F.3d 665 (5th Cir. 2016); Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit, 453 F.3d 1160, 27 A.L.R.6th 645 (9th Cir. 2006).

2 In re Doe, 642 F.3d 663 (8th Cir. Jud. Council 2011).

3 28 U.S.C.A. § 455.

4 U. S. v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980).

5 Duplantier v. U.S., 606 F.2d 654 (5th Cir. 1979).

6 Andersen v. Roszkowski, 681 F. Supp. 1284 (N.D. Ill. 1988), judgment aff'd, 894 F.2d 1338 (7th Cir. 1990).

7 Zaleski v. Burns, 606 F.3d 51 (2d Cir. 2010); Andersen v. Roszkowski, 681 F. Supp. 1284 (N.D. Ill. 1988), judgment aff'd, 894 F.2d 1338 (7th Cir. 1990).

8 Pilla v. American Bar Ass'n, 542 F.2d 56 (8th Cir. 1976).

9 Haase v. Countrywide Home Loans, Incorporated, 838 F.3d 665 (5th Cir. 2016); Glick v. Edwards, 803 F.3d 505 (9th Cir. 2015), cert. denied, 137 S. Ct. 144, 196 L. Ed. 2d 112 (2016).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

b. Procedure

§ 47. Filing requirements of motion to disqualify or recuse federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(1) to 51(4)

Forms

Forms relating to judge disqualification, generally, see Federal Procedural Forms, Criminal Procedure; Federal Procedural Forms, Actions in District Court [Westlaw® Search Query]

Under the statute providing for the disqualification of district judges for bias or prejudice, a party must file a timely affidavit averring such bias or prejudice.[1] An affidavit supporting the disqualification of a judge for bias or prejudice must strictly comply with all of the requirements set forth in the statute before it will effectively disqualify a judge.[2] Failure to submit a properly notarized and sufficient affidavit bars a recusal motion.[3] A party may file only one such affidavit in any case, and it must be accompanied by a certificate of counsel of record stating that it is made in good faith.[4] Counsel's failure to certify that the motion for recusal is made in good faith is grounds for denying the motion.[5] Moreover, the mere fact that a party has filed a motion to disqualify a judge, accompanied by the requisite affidavit and certificate of counsel, does not automatically result in the challenged judge's disqualification;[6] rather, recusal is required only upon filing of a timely and sufficient affidavit.[7]

Practice Tip:

A defendant cannot rely on a codefendant's affidavit and certification of good faith in seeking recusal of a judge, but has to file his own documents.[8]

Under the general disqualification statute,[9] no affidavit need be filed,[10] because the statute directing a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned places a duty directly upon the judge to evaluate his own actions.[11] Nevertheless, a party may file a motion to disqualify under the general disqualification statute.[12] In fact, a formal motion is the preferable means of raising the issue, although the matter may be sufficiently raised by other means.[13]

Footnotes

1 28 U.S.C.A. § 144.

2 In re Medlock, 406 F.3d 1066 (8th Cir. 2005).

3 Youn v. Track, Inc., 324 F.3d 409, 55 Fed. R. Serv. 3d 611, 2003 FED App. 0087P (6th Cir. 2003); Johnson v. Irby, 403 Fed. Appx. 465 (11th Cir. 2010).

4 28 U.S.C.A. § 144.

5 U.S. v. Miller, 355 F. Supp. 2d 404 (D.D.C. 2005).

6 Strange v. Islamic Republic of Iran, 46 F. Supp. 3d 78 (D.D.C. 2014).

7 Klayman v. Judicial Watch, Inc., 744 F. Supp. 2d 264 (D.D.C. 2010).
As to factual basis and legal sufficiency of affidavit in support of motion, see § 48.
As to timeliness of motion to disqualify or recuse federal judge, see § 49.
As to determination of motion and presumptions and burden of proof, see § 50.

8 U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011).

9 28 U.S.C.A. § 455.

10 In re Beard, 811 F.2d 818 (4th Cir. 1987).

11 United States v. Farkas, 149 F. Supp. 3d 685 (E.D. Va. 2016), aff'd, 669 Fed. Appx. 122 (4th Cir. 2016).
As to duties related to judge's disqualification, see §§ 42 to 46.

12 U.S. v. Nickl, 427 F.3d 1286, 68 Fed. R. Evid. Serv. 837 (10th Cir. 2005).

13 Hardy v. U.S., 878 F.2d 94 (2d Cir. 1989).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

b. Procedure

§ 48. Factual basis and legal sufficiency in support of motion to disqualify or recuse federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(1), 51(3)

A.L.R. Library

Form and requirements of certificate and affidavit of disqualification of trial judge under 28 U.S.C.A. sec. 144, 23 A.L.R. Fed. 637

The statute providing for the disqualification of district judges for bias or prejudice expressly requires that the affidavit must state the facts and the reasons for the belief that bias or prejudice exists.[1] The affiant has the burden of making a threefold showing: (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that a bias exists; and (3) the facts must show that the bias is personal, as opposed to judicial, in nature.[2] The facts alleged in a motion to disqualify and the accompanying affidavits must be legally sufficient and demonstrate the judge's personal bias or prejudice against a party.[3] To be legally sufficient, an affidavit must show the objectionable inclination or disposition of the judge and it must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.[4] An affidavit of bias or prejudice is strictly construed against the affiant.[5] Mere conclusions, rumors, gossip, beliefs, and opinions are not sufficient to form a basis for disqualification,[6] as the affidavit must state with the required particularity the identifying facts of time, place, persons, occasion, and circumstances.[7]

While a party need not file an affidavit under the general disqualification statute,[8] a charge of impartiality must be supported by facts.[9] Indeed, the Supreme Court has stated that it is critically important to identify the facts that might reasonably cause an objective observer to question the judge's impartiality.[10] A presiding judge is not required to recuse him or herself simply because of unsupported, irrational or highly tenuous speculation.[11] Disqualification occurs only where a charge of bias is supported by a factual basis and those facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality.[12] Compulsory recusal requires more than subjective fears, unsupported accusations or unfounded surmise.[13]

Practice Tip:

Where a party presents a motion for disqualification under the general disqualification statute[14] which asserts a basis as to which the statute providing for disqualification of a district judge based on bias or prejudice[15] is applicable and which includes a sufficient affidavit under that provision, and where the basic underlying facts as set forth in the affidavit are not in dispute, the district court should not minutely examine the movant's characterization of them and weigh the court's memory of what happened as against that of the affiant. It is inappropriate in such circumstances for the court to make a credibility assessment of itself.[16] Moreover, where the district judge does not hold a hearing or question the accuracy of the moving party's affidavits in any way, a reviewing court will accept the affidavits as true.[17]

Footnotes

1 28 U.S.C.A. § 144.

2 Patterson v. Mobil Oil Corp., 335 F.3d 476 (5th Cir. 2003); Alston v. Administrative Offices of Delaware Courts, 178 F. Supp. 3d 222 (D. Del. 2016), aff'd, 663 Fed. Appx. 105 (3d Cir. 2016).
As to determination of motion to disqualify or recuse federal judge, and presumptions and burden of proof, see § 50.

3 Hoffman v. Caterpillar, Inc., 368 F.3d 709, 64 Fed. R. Evid. Serv. 498, 58 Fed. R. Serv. 3d 432 (7th Cir. 2004).

4 Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

5 Salt Lake Tribune Pub. Co., LLC v. AT & T Corp., 353 F. Supp. 2d 1160 (D. Utah 2005).

6 Livecchi v. Gordon, 544 B.R. 57 (W.D. N.Y. 2015); In re Nicole Energy Services, Inc., 423 B.R. 840 (Bankr. S.D. Ohio 2010).

7 Klayman v. Judicial Watch, Inc., 744 F. Supp. 2d 264 (D.D.C. 2010); Salt Lake Tribune Pub. Co., LLC v. AT & T Corp., 353 F. Supp. 2d 1160 (D. Utah 2005).

8 28 U.S.C.A. § 455.
As to filing requirements of motion to disqualify or recuse federal judge, see § 47.

9 U.S. v. Garcia, 476 Fed. Appx. 322 (5th Cir. 2012); U.S. v. Bobo, 395 F. Supp. 2d 1116 (N.D. Ala. 2004).

10 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855, 47 Ed. Law Rep. 366, 11 Fed. R. Serv. 3d 433 (1988).

11 U.S. v. Cherry, 330 F.3d 658 (4th Cir. 2003).

12 Fideicomiso De La Tierra del Cano Martin Pena v. Fortuno, 631 F. Supp. 2d 134 (D.P.R. 2009).

13 Fideicomiso De La Tierra del Cano Martin Pena v. Fortuno, 631 F. Supp. 2d 134 (D.P.R. 2009).

14 28 U.S.C.A. § 455.

15 28 U.S.C.A. § 144.

16 U.S. v. Furst, 886 F.2d 558, 28 Fed. R. Evid. Serv. 1330 (3d Cir. 1989).

17 Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988).
As to determination of motion to disqualify or recuse federal judge and acceptance of facts as true, see § 51.

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

b. Procedure

§ 49. Timeliness of motion to disqualify or recuse federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(2)

A.L.R. Library

Timeliness of affidavit of disqualification of trial judge under 28 U.S.C.A. sec. 144, 141 A.L.R. Fed. 311

The statute providing for disqualification of district court judges for bias or prejudice expressly states that a party seeking disqualification must file a timely affidavit.[1] The affidavit must be filed not less than 10 days before the beginning of the term at which the proceeding is to be heard, or good cause must be shown for failure to file it within such time.[2] An affidavit is timely if it is filed promptly after the movant learns of the basis for disqualification.[3]

Even though the general disqualification statute,[4] does not contain an express provision as to timeliness of the motion,[5] it is generally required that a motion for recusal must be filed in a timely manner,[6] regardless of whether the recusal is sought based on the judge's lack of impartiality or on the judge's personal bias, knowledge, or involvement.[7] The policy considerations supporting a timeliness requirement for judicial recusal motions are to conserve judicial resources and prevent a litigant from waiting until an adverse decision has been handed down before moving to disqualify the judge.[8] Courts will reject what appear to be strategic motions to recuse a judge whose rulings have gone against the party.[9] Even a brief delay in filing the motion for recusal can result in denial for untimeliness,[10] and therefore, in general, a party must raise the recusal issue at the earliest possible moment after acquiring actual knowledge[11] of the relevant facts[12] demonstrating the basis for such

a claim,[13] which is generally held to mean that recusal motions should be filed with reasonable promptness after the ground for the motion is ascertained.[14] It has also been said that the timeliness of a disqualification motion is only one factor in deciding whether a federal judge should be relieved.[15]

Practice Tip:

There is no formula for determining how much time can elapse between the time that a movant learns of the facts supporting a recusal motion and the date the motion is filed.[16] In deciding whether a recusal motion is timely, courts look to a number of factors, including whether (1) the movant has participated in a substantial manner in the trial or pretrial proceedings, (2) granting the motion would represent a waste of judicial resources, (3) the motion was made after entry of judgment, and (4) the movant can demonstrate good cause for delay.[17]

The requirement that a recusal motion must be timely filed applies not only to motions based on an alleged appearance of partiality,[18] but to those based upon a judge's actual bias or prejudice or personal knowledge of disputed evidentiary facts under a separate section of the recusal statute.[19] The fact that grounds specified for recusal in this section of the statute are not waivable by the parties[20] does not mean that the parties, having participated in the judicial proceedings and perceiving how the judge is inclined to rule, can waste judicial resources by belatedly seeking the judge's recusal.[21]

Observation:

Untimeliness in filing a motion to disqualify a judge can sometimes constitute the basis for finding an implied waiver of the right to seek recusal.[22]

CUMULATIVE SUPPLEMENT

Cases:

Recusal motions should be filed when the facts forming the basis of that motion become known. Tenn. Sup. Ct. R. 10B, § 1.01. Cook v. State, 606 S.W.3d 247 (Tenn. 2020).

[END OF SUPPLEMENT]

Footnotes

1 28 U.S.C.A. § 144; S.E.C. v. Loving Spirit Foundation Inc., 392 F.3d 486 (D.C. Cir. 2004); Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017) (motion for recusal was timely where based on comments the judge

made just over a week before filing, but not timely where based on comments the judge made several months before filing).

2 28 U.S.C.A. § 144.

3 United States v. Betts-Gaston, 860 F.3d 525 (7th Cir. 2017).

4 28 U.S.C.A. § 455.

5 Apple v. Jewish Hosp. and Medical Center, 829 F.2d 326 (2d Cir. 1987); Da Silva Moore v. Publicis Groupe, 868 F. Supp. 2d 137 (S.D. N.Y. 2012).

6 U.S. v. Whorley, 550 F.3d 326 (4th Cir. 2008); Tri-State Financial, LLC v. Lovald, 525 F.3d 649, 34 A.L.R. Fed. 2d 819 (8th Cir. 2008).

7 Kolon Industries Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160 (4th Cir. 2014); In re Steward, 828 F.3d 672 (8th Cir. 2016).

8 U.S. v. O'Brien, 18 F. Supp. 3d 25 (D. Mass. 2014).

9 In re Sanders, 540 B.R. 911 (Bankr. S.D. Fla. 2015).

10 In re Byers, 509 B.R. 577 (Bankr. S.D. Ohio 2014).

11 In re Kensington Intern. Ltd., 368 F.3d 289 (3d Cir. 2004).

12 American Prairie Const. Co. v. Hoich, 560 F.3d 780 (8th Cir. 2009); In re Invent Resources, Inc., 518 B.R. 169 (D. Mass. 2014).

13 In re Steward, 828 F.3d 672 (8th Cir. 2016).

14 Skokomish Indian Tribe v. U.S., 410 F.3d 506 (9th Cir. 2005); In re Moore, 488 B.R. 120 (D. Haw. 2013).

15 In re Kensington Intern. Ltd., 368 F.3d 289 (3d Cir. 2004).

16 In re Owens Corning, 305 B.R. 175 (D. Del. 2004).

17 Taylor v. Vermont Dept. of Educ., 313 F.3d 768, 172 Ed. Law Rep. 87 (2d Cir. 2002); Da Silva Moore v. Publicis Groupe, 868 F. Supp. 2d 137 (S.D. N.Y. 2012).

18 28 U.S.C.A. § 455(a), discussed further at §§ 58 to 73.

19 28 U.S.C.A. § 455(b), discussed further at §§ 74 to 99.
Kolon Industries Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160 (4th Cir. 2014).

20 28 U.S.C.A. § 455(e).

21 In re Owens Corning, 305 B.R. 175 (D. Del. 2004).

22 In re Yehud-Monosson USA, Inc., 472 B.R. 795 (D. Minn. 2012); U.S. v. Brooks, 55 F. Supp. 3d 247 (E.D. N.Y. 2014); State v. Jacobson, 2008 ND 73, 747 N.W.2d 481 (N.D. 2008).
As to waiver of disqualification of federal judge, see § 52.

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

b. Procedure

§ 50. Determination of motion to disqualify or recuse federal judge; presumptions and burden of proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(1) to 51(4)

Forms

Forms relating to judge disqualification, generally, see Federal Procedural Forms, Criminal Procedure; Federal Procedural Forms, Actions in District Court [Westlaw® Search Query]

Disqualification of a judge is not automatic upon submission of an affidavit supporting a motion for disqualification and certificate; rather, the judge must review these submissions for legal sufficiency and construe them strictly against the movant to prevent abuse.[1] Courts should take special care in reviewing recusal claims so as to prevent parties from abusing the recusal statute for a dilatory and litigious purpose based on little or no substantiated basis.[2] A party introducing a motion to recuse carries a heavy burden of proof.[3] A judge is presumed to be impartial,[4] and the party seeking disqualification bears the substantial burden of proving otherwise[5] by clear and convincing evidence.[6] Importantly, there is no burden on the judge to prove that he or she is impartial.[7] However, the general presumption that judges are not biased is rebuttable.[8]

A motion to disqualify a federal district judge is committed to the sound discretion of the district judge.[9] If the issue of whether a judge's disqualification is required is a close one, the judge must be recused,[10] since under the recusal standard, any reasonable doubts about the partiality of the judge ordinarily are to be resolved in favor of recusal.[11] However, the statute

which mandates a judge's recusal in any proceeding in which his or her impartiality might reasonably be questioned[12] must not be construed so broadly that it becomes, in effect, presumptive, such that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.[13] On a motion to recuse, a district court judge should not indulge a presumption either in favor of, or against, recusal, but should exercise its most considered judgment, weigh the arguments of both sides equally, and heed the admonition that a judge is as much obliged not to recuse him or herself where it is not called for as he or she is obliged to when it is.[14]

Observation:

Motions to disqualify a judge are fact driven, and as a result, the analysis of a particular claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue,[15] as comparison is an inexact construct in this context.[16]

If an issue of a judge recusing him or herself arises either through a motion to recuse or an affidavit of prejudice, the judge has the option to either transfer the matter to another judge for decision or determine it him or herself.[17] When a litigant files a motion for recusal of a district court judge, the judge is required by statute only to ensure that another judge is assigned to the case if the litigant has sufficiently alleged bias or prejudice, and there is no requirement that the recusal decision itself be rendered by a judge other than the judge to whom the recusal motion is addressed.[18] A judge may, in his or her discretion, conduct an evidentiary hearing or transfer a recusal request to another judge for determination.[19] Since a judge is not required to transfer to another judge a party's motion for disqualification,[20] a judge does not abuse his or her discretion in ruling on the motion.[21]

Although the matter is ultimately within the discretion of the challenged judge, recusal motions should only be transferred in unusual circumstances.[22] Another view is that while the presiding judge can best decide whether the claim asserted is within the scope of the general disqualification statute, a disinterested judge should be enlisted to determine the facts.[23]

Practice Tip:

Judges are under no obligation to provide a statement of reasons for recusal.[24]

CUMULATIVE SUPPLEMENT

Cases:

The standard for judging the appearance of partiality on a motion for recusal is objective: whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. 28 U.S.C.A. § 455(a). McCray v. Ryan, 389 F. Supp. 3d 663 (D. Ariz. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Armenian Assembly of America, Inc. v. Cafesjian, 783 F. Supp. 2d 78 (D.D.C. 2011).
As to filing requirements of motion to disqualify or recuse federal judge, see § 47.

2 Sensley v. Albritton, 385 F.3d 591 (5th Cir. 2004).

3 Burley v. Gagacki, 834 F.3d 606 (6th Cir. 2016); In re Steward, 828 F.3d 672 (8th Cir. 2016).

4 U.S. v. Ali, 799 F.3d 1008 (8th Cir. 2015); Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

5 United States v. Minard, 856 F.3d 555 (8th Cir. 2017); Alston v. Administrative Offices of Delaware Courts, 178 F. Supp. 3d 222 (D. Del. 2016), aff'd, 663 Fed. Appx. 105 (3d Cir. 2016).

6 In re Wilborn, 401 B.R. 848, 49 A.L.R.6th 669 (Bankr. S.D. Tex. 2009).

7 In re McCarthey, 368 F.3d 1266 (10th Cir. 2004).

8 Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005).

9 In re: Deepwater Horizon, 824 F.3d 571 (5th Cir. 2016).

10 Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002).

11 In re U.S., 441 F.3d 44 (1st Cir. 2006); In re Moody, 755 F.3d 891 (11th Cir. 2014).

12 28 U.S.C.A. § 455(a).

13 In re Bennett, 283 B.R. 308 (B.A.P. 10th Cir. 2002).

14 In re Owens Corning, 305 B.R. 175 (D. Del. 2004).
As to duties related to judge's disqualification, see §§ 42 to 46.

15 Clemens v. U.S. Dist. Court for Central Dist. of California, 428 F.3d 1175 (9th Cir. 2005); U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011).

16 Rodriguez-Vilanova v. Stryker Corp., 987 F. Supp. 2d 153 (D.P.R. 2013).
As to factual basis and legal sufficiency in support of motion to disqualify or recuse federal judge, see § 48.

17 Salt Lake Tribune Pub. Co., LLC v. AT & T Corp., 353 F. Supp. 2d 1160 (D. Utah 2005).

18 Akins v. Knight, 863 F.3d 1084 (8th Cir. 2017).

19 U.S. v. Cherry, 330 F.3d 658 (4th Cir. 2003).

20 Kante v. Countrywide Home Loans, 430 Fed. Appx. 844 (11th Cir. 2011).

21 Karim-Panahi v. U.S. Congress, Senate and House of Representatives, 105 Fed. Appx. 270 (D.C. Cir. 2004).

22 Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., 690 F.2d 1157, 35 Fed. R. Serv. 2d 268 (5th Cir. 1982).

23 Levitt v. University of Texas at El Paso, 847 F.2d 221, 46 Ed. Law Rep. 1128 (5th Cir. 1988).

24 U.S. v. Casas, 376 F.3d 20 (1st Cir. 2004).

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32 Am. Jur. 2d Federal Courts § 51

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

b. Procedure

§ 51. Determination of motion to disqualify or recuse federal judge; presumptions and burden of proof—Acceptance of facts as true

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(1), 51(2)

Forms

Forms relating to judge disqualification, generally, see Federal Procedural Forms, Criminal Procedure; Federal Procedural Forms, Actions in District Court [Westlaw® Search Query]

When a party files a motion for disqualification and a supporting affidavit under the statutory provision authorizing recusal where a judge has personal bias or prejudice concerning a party,[1] all of the factual allegations in a properly pleaded affidavit of bias or prejudice must be taken as true for the purpose of the motion.[2] This is so even if the court knows the factual allegations to be false.[3] The court decides only whether the affidavit is timely and legally sufficient.[4] Judge disqualification is not automatic upon the submission of an affidavit and certificate, however, as the judge must review these submissions for legal sufficiency,[5] and construe them strictly against the movant to prevent abuse.[6] While a court must assume the truth of the factual assertions behind a motion to disqualify under this provision, it is not bound to accept the movant's conclusions as to the facts' significance.[7]

On the other hand, under the general disqualification statute,[8] there is no requirement that the judge accept, for purposes of deciding the issue, factual allegations as true.[9] The judge may scrutinize the factual accuracy of the movant's affidavits,[10] and

may supplement the record and may even contradict the movant's factual allegations with facts from the judge's own knowledge acquired in the course of the proceedings.[11]

Observation:

The requirement that a judge assume that the facts asserted in an affidavit alleging that the judge has personal bias or prejudice are true has no application to a motion to recuse a bankruptcy judge, which can only be brought under the general disqualification statute.[12]

Footnotes

1 28 U.S.C.A. § 144.

2 Williams v. New York City Housing Authority, 287 F. Supp. 2d 247 (S.D. N.Y. 2003).
As to factual basis and legal sufficiency of affidavit in support of motion, see § 48.

3 Te-Ta-Ma Truth Foundation—Family of URI, Inc. v. World Church of the Creator, 246 F. Supp. 2d 980 (N.D. Ill. 2003); U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011).

4 Salt Lake Tribune Pub. Co., LLC v. AT & T Corp., 353 F. Supp. 2d 1160 (D. Utah 2005).

5 U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011).

6 Armenian Assembly of America, Inc. v. Cafesjian, 783 F. Supp. 2d 78 (D.D.C. 2011); Hoffenberg v. U.S., 333 F. Supp. 2d 166 (S.D. N.Y. 2004).
As to determination of motion to disqualify or recuse federal judge and presumptions and burden of proof, generally, see § 50.

7 Hoffman v. Caterpillar, Inc., 368 F.3d 709, 64 Fed. R. Evid. Serv. 498, 58 Fed. R. Serv. 3d 432 (7th Cir. 2004).

8 28 U.S.C.A. § 455.

9 Cooney v. Booth, 262 F. Supp. 2d 494 (E.D. Pa. 2003), aff'd, 108 Fed. Appx. 739 (3d Cir. 2004).

10 In re Owens Corning, 305 B.R. 175 (D. Del. 2004).

11 Salt Lake Tribune Pub. Co., LLC v. AT & T Corp., 353 F. Supp. 2d 1160 (D. Utah 2005).

12 In re Haas, 292 B.R. 167 (Bankr. S.D. Ohio 2003).
As to application of disqualification and recusal statutes, see § 43.

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

b. Procedure

§ 52. Waiver of disqualification of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 53, 54

The general disqualification statute provides that no federal judge may accept from the parties to a proceeding a waiver of any of the enumerated grounds[1] for disqualification.[2] Thus, a party may not waive a ground for recusal when the issue is actual judicial bias or prejudice.[3]

The statute further provides that a waiver of disqualification on the ground that the judge's impartiality may be questioned,[4] may be accepted if it is preceded by a full disclosure on the record of the basis for disqualification.[5] Thus, a party may waive a ground for recusal when the issue is only one of an appearance of partiality.[6] The procedural requirements for such a waiver must be strictly construed.[7] A party is bound by his or her attorney's decision to waive a ground of disqualification,[8] and a waiver of grounds for recusal generally cannot be withdrawn at a later date.[9] However, a party's proffer of a waiver does not bind the judge to forego a recusal which is required by the appearance of lack of impartiality.[10]

Waiver and timeliness are distinct issues, as the waiver provision[11] prohibits the parties from agreeing to relinquish their rights to have the judge recuse him or herself under the enumerated grounds for disqualification,[12] while the timeliness requirement forces the parties to raise a disqualification issue at a reasonable time in the litigation, thus prohibiting knowing concealment of an ethical issue for strategic purposes.[13] Untimeliness in filing a motion to disqualify a judge can sometimes constitute the basis for finding an implied waiver of the right to seek recusal.[14] A failure to object to a court's rulings when the district court still has an opportunity to correct any irregularity constitutes acquiescence in the denial of a recusal motion.[15]

Practice Tip:

The distinction between a waiver and forfeiture of a recusal claim is an important one: if a party waives a recusal claim, then judicial review is precluded. If, however, a party forfeits an error, and the error is plain and affects substantial rights, then the court of appeals has authority to order correction, but is not required to do so.[16]

Footnotes

1 28 U.S.C.A. § 455(b), discussed further in §§ 74 to 99.

2 28 U.S.C.A. § 455(e).

3 Sullivan v. Chesapeake and Ohio Ry. Co., 947 F.2d 946 (6th Cir. 1991) (not precluded from raising issue of waiver on appeal); United States v. Sampson, 148 F. Supp. 3d 75 (D. Mass. 2015), adhered to on reconsideration, 2015 WL 13333677 (D. Mass. 2015).

4 28 U.S.C.A. § 455(a).

5 28 U.S.C.A. § 455(e); Shervin v. Partners Healthcare System, Inc., 804 F.3d 23, 98 Fed. R. Evid. Serv. 922 (1st Cir. 2015); Fletcher v. Conoco Pipe Line Co., 323 F.3d 661 (8th Cir. 2003).

6 United States v. Sampson, 148 F. Supp. 3d 75 (D. Mass. 2015), adhered to on reconsideration, 2015 WL 13333677 (D. Mass. 2015); Fideicomiso De La Tierra del Cano Martin Pena v. Fortuno, 631 F. Supp. 2d 134 (D.P.R. 2009).

7 Barksdale v. Emerick, 853 F.2d 1359 (6th Cir. 1988).

8 Brody v. President & Fellows of Harvard College, 664 F.2d 10, 1 Ed. Law Rep. 524 (1st Cir. 1981); U.S. v. Brooks, 55 F. Supp. 3d 247 (E.D. N.Y. 2014).

9 U.S. v. Sampson, 12 F. Supp. 3d 203 (D. Mass. 2014).

10 U.S. v. Pepper & Potter, Inc., 677 F. Supp. 123 (E.D. N.Y. 1988).

11 28 U.S.C.A. § 455(e).

12 28 U.S.C.A. § 455(b).

13 U.S. v. York, 888 F.2d 1050, 29 Fed. R. Evid. Serv. 142 (5th Cir. 1989).

14 U.S. v. Brooks, 55 F. Supp. 3d 247 (E.D. N.Y. 2014).
As to timeliness of motion to disqualify or recuse federal judge and implied waiver, see § 49.

15 Martinez v. Tarrant, 59 Fed. Appx. 998 (9th Cir. 2003).

16 Fowler v. Butts, 829 F.3d 788 (7th Cir. 2016); Fletcher v. Conoco Pipe Line Co., 323 F.3d 661 (8th Cir. 2003).
As to appellate review, see §§ 53 to 57.

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

c. Appellate Review

§ 53. Appellate review of district court ruling denying motion to recuse federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 3546(2), 3594

West's Key Number Digest, Judges 51(4)

A.L.R. Library

Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise, 27 A.L.R.6th 403

Review of federal judge's grant or denial of motion to recuse, 64 A.L.R. Fed. 433

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Review of a district court judge's denial of a motion that the judge recuse him or herself can be had in the court of appeals in connection with the appeal of the final order in the case.[1] Where a motion to recuse is made and denied after a judgment on

the merits, during an extended remedial phase, the denial is appealable.[2]

Observation:

The court of appeals reviews judicial recusal decisions for abuse of discretion.[3] The harmless error doctrine applies to violations of the disqualification statutes.[4]

When reviewing the denial of a recusal motion, the court of appeals independently assesses questions raised about a judge's impartiality from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.[5] The court of appeals considers the petitioner's allegations as well as the judge's rulings on and conduct regarding them, and asks whether an objective, disinterested observer fully informed of the underlying facts would entertain significant doubt that justice would be done absent recusal.[6] There are three factors to be considered in determining whether a judgment should be vacated for a violation of the statute requiring any justice, judge, or magistrate to disqualify himself in any proceeding in which his impartiality might reasonably be questioned: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.[7] Ultimately, the question for an appellate court regarding whether a federal judge should be recused is not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by a reasonable reading of the record.[8]

Footnotes

1 Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., 690 F.2d 1157, 35 Fed. R. Serv. 2d 268 (5th Cir. 1982).

2 U.S. v. Yonkers Bd. of Educ., 946 F.2d 180 (2d Cir. 1991).

3 In re: Deepwater Horizon, 824 F.3d 571 (5th Cir. 2016); Burley v. Gagacki, 834 F.3d 606 (6th Cir. 2016); Akins v. Knight, 863 F.3d 1084 (8th Cir. 2017).

4 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855, 47 Ed. Law Rep. 366, 11 Fed. R. Serv. 3d 433 (1988); In re Continental Airlines Corp., 901 F.2d 1259 (5th Cir. 1990).

5 In re City of Milwaukee, 788 F.3d 717 (7th Cir. 2015).

6 In re Basciano, 542 F.3d 950 (2d Cir. 2008).

7 CEATS, Inc. v. Continental Airlines, Inc., 755 F.3d 1356, 88 Fed. R. Serv. 3d 1431 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 1549, 191 L. Ed. 2d 636 (2015).

8 Fideicomiso De La Tierra del Cano Martin Pena v. Fortuno, 631 F. Supp. 2d 134 (D.P.R. 2009).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

c. Appellate Review

§ 54. Appellate review of district court ruling denying motion to recuse federal judge—Finality; interlocutory appeal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 3275, 3319(1), 3319(2)

West's Key Number Digest, Judges 51(4)

Ordinarily, an order denying a motion to recuse is not immediately appealable as a final judgment[1] and does not fall within the narrow collateral order exception to the finality requirement,[2] but the denial of such a motion can be reviewed on the appeal of an interlocutory order which is itself appealable.[3] Thus, orders denying motions to disqualify a trial judge are fully reviewable after entry of the final judgment but cannot be appealed immediately as an interlocutory appeal.[4]

In addition, an order on a disqualification motion may be certified for an interlocutory appeal by permission,[5] if the order raises a controlling question of law as to which there may be a substantial ground for difference of opinion and an immediate appeal from such order may materially advance the ultimate termination of the litigation.[6]

Footnotes

1 28 U.S.C.A. § 1291.

2 U.S. v. Yonkers Bd. of Educ., 946 F.2d 180 (2d Cir. 1991).

3 Collier v. Picard, 237 F.2d 234 (6th Cir. 1956).

[4] U.S. v. Gregory, 656 F.2d 1132 (5th Cir. 1981); Cooper v. U.S., 2007 WL 1655518 (S.D. Ohio 2007).

[5] 28 U.S.C.A. § 1292(b).

[6] Haas v. Pittsburgh Nat. Bank, 627 F.2d 677 (3d Cir. 1980); Netsphere, Inc. v. Baron, 703 F.3d 296 (5th Cir. 2012); In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 55 A.L.R. Fed. 644 (10th Cir. 1980) (order granting disqualification).
As to interlocutory appeals by permission under 28 U.S.C.A. § 1292(b), generally, see Am. Jur. 2d, Appellate Review §§ 110 to 129.

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

c. Appellate Review

§ 55. Appellate review of district court ruling denying motion to recuse federal judge—Preserving error for review

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Federal Courts 3391

West's Key Number Digest, Judges 51(2), 51(4)

In order to preserve an issue of disqualification for review it is ordinarily necessary to raise it during the trial.[1] A formal motion to do so is preferable, although the matter may be sufficiently raised by other means.[2] An affidavit under the statute providing for disqualification of district court judges for bias or prejudice[3] also preserves a disqualification point under the general disqualification statute,[4] even if the trial judge did not expressly consider the application of the latter statute.[5] While in some circuits, failure to raise an issue of disqualification in the trial court does not waive the issue per se,[6] in most circuits a motion for disqualification must have been raised in a timely manner,[7] and if no motion is made to the trial judge a party will bear a greater burden on appeal in demonstrating that the judge erred in failing to recuse him or herself under the general disqualification statute.[8] In some circuits, where a party does not raise an issue of disqualification during trial, the plain error standard of review applies when the issue is raised on appeal.[9]

Footnotes

1 Hardy v. U.S., 878 F.2d 94 (2d Cir. 1989); Taylor Acquisitions, L.L.C. v. City of Taylor, 313 Fed. Appx. 826 (6th Cir. 2009).

2 Hardy v. U.S., 878 F.2d 94 (2d Cir. 1989).

[3] 28 U.S.C.A. § 144.

[4] 28 U.S.C.A. § 455.

[5] U.S. v. Sibla, 624 F.2d 864 (9th Cir. 1980).

[6] In re Manoa Finance Co., Inc., 781 F.2d 1370 (9th Cir. 1986).

[7] As to timeliness of motion to disqualify or recuse federal judge, see § 49.

[8] Noli v. C.I.R., 860 F.2d 1521 (9th Cir. 1988).

[9] U.S. v. Bosch, 951 F.2d 1546 (9th Cir. 1991).

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II. Judges

E. Disqualification and Recusal of Judges

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c. Appellate Review

§ 56. Mandamus following district court's denial of recusal motion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 51(3)

West's Key Number Digest, Mandamus 29

A.L.R. Library

Mandamus as remedy to compel disqualification of federal judge, 56 A.L.R. Fed. 494

A court of appeals will consider a petition for mandamus following a district court's denial of a motion to disqualify based on the general disqualification statute (28 U.S.C.A. § 455).[1] A mandamus petition is the proper way to challenge a district judge's denial of a recusal motion[2] as few situations are more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify him or herself.[3] However, since a district court's refusal to recuse on the ground that the court's impartiality might reasonably be questioned can be challenged on direct appeal, the party seeking recusal is not required to challenge the district court's refusal to recuse by petitioning the court of appeals for a writ of mandamus.[4]

Under certain circumstances, a court of appeals may entertain a writ of mandamus by a party seeking to vacate a judge's order of recusal, such as when the petitioner hopes to avoid costs and delay that would result from the assignment of a new judge to complex litigation and to prevent the loss of the trial judge's relief work and knowledge of the case.[5]

Caution:

A petition for a writ of mandamus for a federal district judge to disqualify him or herself will be denied when the motion is untimely and is interposed for suspect tactical and strategic reasons.[6] Mandamus will be denied with sanctions if the petition for mandamus is frivolous.[7]

The denial by a court of appeals of a writ of mandamus seeking to disqualify a district court judge pursuant to the general disqualification statute[8] becomes the law of the case with respect to any subsequent petition to disqualify a district court judge for bias or prejudice,[9] in the absence of new and substantially different evidence, an intervening change in the law, or a finding that the court of appeals' decision is clearly erroneous or works manifest injustice.[10]

The standard for review on mandamus differs among the circuits, and one view is that the court of appeals will issue the writ of mandamus only if the petitioner has satisfied the burden of establishing that its right to have the judge disqualified is clear and indisputable,[11] that a writ of mandamus will not issue when all that is shown is that the district court abused its discretion when making the challenged ruling,[12] and that the appellate court must ask itself not whether it would have decided as the trial court did not but whether that decision cannot be defended as a rational conclusion supported by a reasonable reading of the record.[13] Thus, a petition for a writ of mandamus based on a district judge's refusal to recuse himself requires that the court of appeals consider both the standard for issuance of the writ and the standard for review of the recusal decision itself.[14] Another view is that the court of appeals will review recusal decisions for abuse of discretion.[15] In the Second Circuit, the petitioner must clearly and indisputably demonstrate that the district court abused its discretion in denying a motion for disqualification.[16] In the Seventh Circuit mandamus review of disqualification rulings is de novo.[17]

The strict standards for issuance of mandamus have been relaxed when the government seeks a judge's recusal in a criminal case, because of the government's inability to press an end-of-case appeal, and courts have reviewed such decisions under the abuse-of-discretion standard, rather than the more exacting standard for mandamus.[18]

Footnotes

1 In re Arunachalam, 812 F.3d 290 (3d Cir. 2016); Cordoza v. Pacific States Steel Corp., 320 F.3d 989, 54 Fed. R. Serv. 3d 1076 (9th Cir. 2003).

2 In re City of Milwaukee, 788 F.3d 717 (7th Cir. 2015).

3 In re International Business Machines Corp., 618 F.2d 923 (2d Cir. 1980).

4 Fowler v. Butts, 829 F.3d 788 (7th Cir. 2016).
As to appellate review of district court ruling denying motion to recuse federal judge, see §§ 53 to 55.

5 In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297, 34 Fed. R. Serv. 2d 1669 (9th Cir. 1982), judgment aff'd, 459 U.S. 1191, 103 S. Ct. 1173, 75 L. Ed. 2d 425 (1983) and opinion supplemented, 709 F.2d 521, 36 Fed. R. Serv. 2d 1537 (9th Cir. 1983).

6 In re Kansas Public Employees Retirement System, 85 F.3d 1353 (8th Cir. 1996).

7 Union Carbide Corp. v. U.S. Cutting Service, Inc., 782 F.2d 710, 4 Fed. R. Serv. 3d 151 (7th Cir. 1986).

8 28 U.S.C.A. § 455.

9 28 U.S.C.A. § 144.

10 U.S. v. Noriega, 752 F. Supp. 444 (S.D. Fla. 1990).

11 In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986) (only under exceptional circumstances); In re Khadr, 823 F.3d 92 (D.C. Cir. 2016).

12 In re Beard, 811 F.2d 818 (4th Cir. 1987).

13 In re Cooper, 821 F.2d 833 (1st Cir. 1987).

14 In re Basciano, 542 F.3d 950 (2d Cir. 2008).

15 In re Karas, 372 Fed. Appx. 298 (3d Cir. 2010); In re Aetna Cas. & Sur. Co., 919 F.2d 1136 (6th Cir. 1990).

16 In re Drexel Burnham Lambert Inc., 861 F.2d 1307 (2d Cir. 1988).

17 Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989).

18 In re U.S., 441 F.3d 44 (1st Cir. 2006).

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II. Judges

E. Disqualification and Recusal of Judges

1. General Principles

c. Appellate Review

§ 57. Procedure on remand following recusal of federal judge; reassignment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Courts 70

A.L.R. Library

Disqualification of original trial judge to sit on retrial after reversal or mistrial; federal cases, 22 A.L.R. Fed. 709

The courts of appeals have the inherent power in the administration of appeals and remands to order a case reassigned to a different judge in the event of retrial or remand.[1] This power rests not on the recusal statutes alone, but on the appellate courts' power, under statute,[2] to require such further proceedings to be had as may be just under the circumstances.[3] However, absent proof of personal bias, the court of appeals will remand to a new judge only under extreme circumstances.[4] Reassignment of a case by the court of appeals is an extraordinary remedy that should seldom be employed.[5]

The court of appeals considers three factors in determining whether reassignment of a case to a different judge is warranted: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.[6]

CUMULATIVE SUPPLEMENT

Cases:

Reassignment to a different judge, on remand from the Court of Appeals, is a remedy reserved for the unusual case. 28 U.S.C.A. § 2106. United States v. Abney, 957 F.3d 241 (D.C. Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Torkington, 874 F.2d 1441 (11th Cir. 1989).

2 28 U.S.C.A. § 2106.

3 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

4 U.S. v. Johnson, 812 F.3d 757 (9th Cir. 2016); O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989). As to personal bias or prejudice, see §§ 74 to 87.

5 U.S. v. Bergrin, 682 F.3d 261, 88 Fed. R. Evid. Serv. 921 (3d Cir. 2012).

6 Gonzalez v. Hasty, 802 F.3d 212 (2d Cir. 2015); U.S. v. Bowen, 799 F.3d 336 (5th Cir. 2015).

32 Am. Jur. 2d Federal Courts § 58

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 58. Applicability of statutory impartiality requirements for federal judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disqualification or Recusal of Judge Due to Comments at Continuing Legal Education (CLE) Seminar or Other Educational Meetings, 49 A.L.R.6th 93

Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Forms

Forms relating to judge bias, generally, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw® Search Query]

Any federal judge must disqualify him or herself in any proceeding in which his or her impartiality might reasonably be questioned.[1] The purpose of the judicial recusal statute requiring a judge to disqualify him or herself for impartiality is to promote public confidence in the integrity of the judicial process,[2] and to avoid even the appearance of partiality.[3] The impartiality provision[4] requires no determination of bias in fact,[5] and applies even though no actual bias or prejudice has been shown.[6] What matters is not the reality of bias or prejudice but the appearance.[7] Thus, it is of no consequence that a judge is not actually biased under the impartiality provision inasmuch as the statute concerns not only fairness to individual litigants, but also the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted.[8]

Further, the impartiality provision places a judge under a self-enforcing obligation to recuse him or herself where the proper legal grounds exist.[9] Thus, disqualification of a judge is required if a reasonable factual basis exists for doubting the judge's impartiality.[10] A judge should not wait until a party moves for disqualification before disqualifying him or herself in a proceeding in which his or her impartiality might reasonably be questioned, as it is the judge's duty to ensure that his or her presence does not taint the process of justice or the integrity of the United States courts.[11] When a judge fails to remove him or herself sua sponte under the impartiality provision, a party may ask the judge to recuse him or herself pursuant to the statute.[12]

A judge will not ordinarily be disqualified on the grounds that his or her impartiality might reasonably be questioned on the basis of rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar nonfactual matters, on the mere fact that the judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose a severe punishment within the limits of the law upon those found guilty of a particular offense.[13] The decision whether a judge's impartiality can reasonably be questioned, for the purpose of a recusal motion, is to be made in light of the facts as they existed, and not as they were surmised or reported.[14]

A federal judge must make disclosure on the record of circumstances that may give rise to a reasonable question about his or her impartiality.[15] However, although the recusal statute requires full disclosure by the judge, it does not contemplate or provide for discovery.[16]

CUMULATIVE SUPPLEMENT

Cases:

Rumor, suspicion, or innuendo do not provide a basis for disqualification of a judge. 28 U.S.C.A. § 455(a). In re Greer, 614 B.R. 747 (Bankr. M.D. Fla. 2020).

[END OF SUPPLEMENT]

Footnotes

1 28 U.S.C.A. § 455(a).

[2] Clemmons v. Wolfe, 377 F.3d 322 (3d Cir. 2004); Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).

[3] U.S. v. Baca, 610 F. Supp. 2d 1203 (E.D. Cal. 2009).
As to purpose of recusal or disqualification of federal judges, see § 42.

[4] 28 U.S.C.A. § 455(a).

[5] U.S. v. Chantal, 902 F.2d 1018 (1st Cir. 1990).

[6] United States v. Herrera-Valdez, 826 F.3d 912 (7th Cir. 2016); Fletcher v. Conoco Pipe Line Co., 323 F.3d 661 (8th Cir. 2003).
As to personal bias or prejudice of federal judge as ground for disqualification, see §§ 74 to 87.

[7] Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).
As to interplay of disqualification statutes based on impartiality, see § 59.

[8] In re Kensington Intern. Ltd., 353 F.3d 211 (3d Cir. 2003).

[9] Glassroth v. Moore, 229 F. Supp. 2d 1283 (M.D. Ala. 2002).
As to who may seek disqualification of federal judge, see § 44.

[10] U.S. v. Cherry, 330 F.3d 658 (4th Cir. 2003).

[11] Obert v. Republic Western Ins. Co., 190 F. Supp. 2d 279 (D.R.I. 2002).

[12] U.S. v. Cooper, 283 F. Supp. 2d 1215 (D. Kan. 2003).

[13] Clemens v. U.S. Dist. Court for Central Dist. of California, 428 F.3d 1175 (9th Cir. 2005); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016); In re Rafter Seven Ranches, LP, 2009 WL 161317 (Bankr. D. Kan. 2009).

[14] Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004).

[15] In re McCarthey, 368 F.3d 1266 (10th Cir. 2004).

[16] United States v. Sampson, 148 F. Supp. 3d 75 (D. Mass. 2015), adhered to on reconsideration, 2015 WL 13333677 (D. Mass. 2015).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 59. Interplay of disqualification statutes based on impartiality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

Section 455 of Title 28 of the United States Code governs the sua sponte recusal of judges and creates two conditions for recusal.[1] Section 455(a) covers circumstances that appear to create a conflict of interest, whether or not there is actual bias. Section 455(b) covers situations in which an actual conflict of interest exists, even if there is no appearance of one.[2] The determination under the recusal statute, requiring a federal judge to disqualify himself in any proceeding in which his impartiality might be reasonably questioned,[3] is made on an objective basis, and is committed to the federal court's sound discretion. In contrast to the recusal statute's "catchall" provision, another provision of the statute requires recusal in specific circumstances,[4] and, unlike the reasoned inquiry under the catchall provision, the determination under that provision is mechanical.[5] To the extent the standards under the sections differ, it is that the personal bias statute requires proof of actual bias, whereas the impartiality statute requires only the reasonable appearance of bias.[6]

The impartiality provision of the general disqualification statute,[7] or "catchall" provision, expands the protection of the provision enumerating specific grounds for disqualification,[8] but duplicates some of the protection of that provision as well.[9] Within the area of overlap, it is unreasonable to interpret the catchall provision as implicitly eliminating a limitation explicitly set forth in the specific provision, unless the language of the catchall provision explicitly requires that elimination.[10] On the other hand, even where the facts do not suffice for recusal on the ground that a judge has actual personal bias, served as a lawyer in the matter in controversy during private practice, or holds a financial interest in a party,[11] those same facts may be examined as part of the inquiry into whether recusal is mandated on the ground that the judge's partiality[12] might reasonably be questioned.[13] Although the provision of the disqualification statute requiring a judge to disqualify himself in

any proceeding in which his impartiality might reasonably be questioned is a catchall provision with broader reach than the provision setting forth specific circumstances requiring recusal and can apply to the same facts, the provisions have some ground in common as well, and should not be applied inconsistently.[14] Allegations of bias and prejudice that are insufficient to justify recusal under statutes requiring recusal if a judge has a personal bias or prejudice concerning a party are likewise insufficient to require recusal under the statute mandating recusal when a judge's impartiality might reasonably be questioned.[15]

Footnotes

1 U.S. v. Amedeo, 487 F.3d 823 (11th Cir. 2007).

2 Brune v. Parrott, 570 B.R. 86 (E.D. Cal. 2017).
As to actual conflicts as grounds for disqualification, see §§ 74 to 99.

3 28 U.S.C.A. § 455(a).

4 28 U.S.C.A. § 455(b).

5 Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).

6 Walsh v. F.B.I., 952 F. Supp. 2d 71 (D.D.C. 2013).

7 28 U.S.C.A. § 455(a).

8 28 U.S.C.A. § 455(b).

9 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).
As to disqualification and recusal statutes, generally, see § 43.

10 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).

11 28 U.S.C.A. § 455(b).

12 28 U.S.C.A. § 455(a).

13 In re Certain Underwriter, 294 F.3d 297 (2d Cir. 2002).

14 In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 305 F. Supp. 2d 323 (S.D. N.Y. 2004).

15 Lyman v. City of Albany, 597 F. Supp. 2d 301 (N.D. N.Y. 2009).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 60. Reasonable person standard for whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954

The impartiality provision of the general disqualification statute provides that a judge is disqualified in any proceeding in which his or her impartiality might reasonably be questioned.[1] Thus, the statute asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits.[2] This means that in determining whether a judge should be disqualified for impartiality under this provision, an objective or "reasonable person" standard is to be used to determine whether the judge's impartiality is to be questioned.[3] This is an objective test[4] that mandates recusal when a reasonable person, knowing all the facts, would question the judge's impartiality,[5] and a party's subjective beliefs about the judge's impartiality are irrelevant,[6] no matter how strongly that view is held.[7]

The proper test for whether a judge should be disqualified is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even

necessarily in the mind of the litigant filing the motion for recusal but, rather, in the mind of the reasonable man.[8] The reasonable person in this context means a well-informed, thoughtful observer, who understands all the relevant facts and has examined the record and law, as opposed to a hypersensitive, cynical, and unduly suspicious person.[9] A reasonable person is the same average layperson on the street who would provide the standard in any case, not a person with professional skills and experience in litigation.[10] With minor variations among the courts of appeals, the test for disqualification for impartiality provision of the general disqualification statute[11] is whether an objective observer with knowledge of all the facts would question the judge's impartiality.[12] The reasonable person's knowledge and understanding of all relevant facts[13] and circumstances is a vital element of this standard, and the decision whether a judge's "impartiality might reasonably be questioned" should not be made in disregard of any relevant facts.[14] The determination under the recusal statute's "catchall" provision is not mechanical, but rather a reasoned consideration of all the facts, requiring the judge to carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case.[15] A judge's actual state of mind or prejudice is not at issue.[16]

Observation:

A violation of the statute which requires a judge to disqualify him or herself in any proceeding in which his or her impartiality might reasonably be questioned[17] does not require scienter.[18] The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the possibility that his or her impartiality might easily be questioned by other persons.[19] Recusal is required even when the judge lacks actual knowledge of facts that would cause a reasonable person to question his impartiality if that reasonable person, knowing all of the circumstances, would expect the judge knew those facts.[20]

Review under the judicial disqualification statute should entail careful consideration of context, that is, the entire course of the judicial proceedings, rather than isolated incidents.[21] Further, mere procedural errors at trial do not indicate partiality.[22]

CUMULATIVE SUPPLEMENT

Cases:

Ex parte communications in connection with administrative matters, including expenses and extensions of time, with Master appointed by judge to investigate reliability of representations made by lawyers in seeking attorney fee award in pension fund's class action, alleging bank and trust company overcharged customers in connection with foreign exchange transactions, did not justify recusal of judge under statute requiring disqualification if the judge's impartiality might reasonably be questioned; judge had duty to protect against unreasonable expense or delay, expressed intention to limit communications to administrative matters, and did not receive from Master any extra-judicial information concerning disputed evidentiary facts. 28 U.S.C.A. § 455(a). Arkansas Teacher Retirement System v. State Street Bank and Trust Company, 404 F. Supp. 3d 486 (D. Mass. 2018).

[END OF SUPPLEMENT]

Footnotes

[1] 28 U.S.C.A. § 455(a).

[2] Clemens v. U.S. Dist. Court for Central Dist. of California, 428 F.3d 1175 (9th Cir. 2005); In re Moody, 755 F.3d 891 (11th Cir. 2014).

[3] Tyler v. Purkett, 413 F.3d 696 (8th Cir. 2005); S.E.C. v. Loving Spirit Foundation Inc., 392 F.3d 486 (D.C. Cir. 2004).

[4] Alston v. Administrative Offices of Delaware Courts, 178 F. Supp. 3d 222 (D. Del. 2016), aff'd, 663 Fed. Appx. 105 (3d Cir. 2016); Redding v. ProSight Specialty Management Co., Inc., 90 F. Supp. 3d 1109 (D. Mont. 2015).

[5] Burley v. Gagacki, 834 F.3d 606 (6th Cir. 2016).

[6] Allphin v. U.S., 758 F.3d 1336 (Fed. Cir. 2014).
As to interplay of disqualification statutes based on impartiality, see § 59.

[7] In re Nicole Energy Services, Inc., 423 B.R. 840 (Bankr. S.D. Ohio 2010).

[8] In re Nicole Energy Services, Inc., 423 B.R. 840 (Bankr. S.D. Ohio 2010).

[9] Sensley v. Albritton, 385 F.3d 591 (5th Cir. 2004); United States v. Quinones, 201 F. Supp. 3d 789 (S.D. W. Va. 2016).

[10] U.S. v. Aldridge, 561 F.3d 759 (8th Cir. 2009); Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297 (10th Cir. 2015).

[11] 28 U.S.C.A. § 455(a).

[12] U.S. v. Kennedy, 682 F.3d 244 (3d Cir. 2012); U.S. v. Lentz, 524 F.3d 501, 76 Fed. R. Evid. Serv. 544 (4th Cir. 2008); United States v. Betts-Gaston, 860 F.3d 525 (7th Cir. 2017); Allphin v. U.S., 758 F.3d 1336 (Fed. Cir. 2014).
The Second Circuit applies the statute requiring a judge to disqualify himself if his impartiality might reasonably be questioned by asking whether an objective, disinterested observer fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal, or alternatively, whether a reasonable person, knowing all the facts, would question the judge's impartiality. Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

[13] E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 847 F. Supp. 2d 843 (E.D. Va. 2012).

[14] Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., Inc., 535 U.S. 229, 122 S. Ct. 1290, 152 L. Ed. 2d 346 (2002).

[15] Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).
As to purpose of recusal or disqualification of federal judge, see § 42.

[16] U.S. v. Nickl, 427 F.3d 1286, 68 Fed. R. Evid. Serv. 837 (10th Cir. 2005).

[17] 28 U.S.C.A. § 455(a).

[18] Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855, 47 Ed. Law Rep. 366, 11 Fed. R. Serv. 3d 433 (1988); U.S. v. Ibarra-Castaneda, 396 F. Supp. 2d 1004 (N.D. Iowa 2005).

[19] Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855, 47 Ed. Law Rep. 366, 11 Fed. R. Serv. 3d 433 (1988).

[20] United States v. Sampson, 148 F. Supp. 3d 75 (D. Mass. 2015), adhered to on reconsideration, 2015 WL 13333677 (D. Mass. 2015).

[21] Andrade v. Chojnacki, 338 F.3d 448 (5th Cir. 2003); Starbuck v. RJ. Reynolds Tobacco Co., 59 F. Supp. 3d 1377 (M.D. Fla. 2014); In re O'Farrell, 498 B.R. 873 (Bankr. S.D. Ind. 2013).

[22] Mayberry v. Maroney, 558 F.2d 1159, 23 Fed. R. Serv. 2d 1078 (3d Cir. 1977).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 61. Extrajudicial source rule pertaining to impartiality of federal judge; effect of adverse rulings on disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

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Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954

Disqualification of original trial judge to sit on retrial after reversal or mistrial; federal cases, 22 A.L.R. Fed. 709

As a general rule, the basis of a motion to disqualify under the impartiality provision of the general disqualification statute[1] must be extrajudicial in character.[2] The "extrajudicial source rule" more or less divides events occurring or opinions expressed in the course of judicial proceedings from those that take place outside of the litigation context and holds that the former rarely require recusal.[3] The judge's lack of impartiality must derive from something other than that which the judge learned by participating in the case,[4] and thus it cannot be in reaction to the evidence or the conduct of the parties that the judge observes in the course of the proceedings.[5] Opinions formed by a judge on the basis of facts introduced or evidence occurring in the course of the current proceedings do not constitute a basis for a bias or partiality motion unless such opinions display a deep-seated antagonism that would make a fair judgment impossible.[6] Parties cannot attack a judge's impartiality on

the basis of information and beliefs acquired while acting in his or her judicial capacity.[7]

It is insufficient to argue, under the statute requiring a judge to disqualify him or herself in any proceeding in which his or her impartiality might be questioned,[8] that a judge cannot be impartial because he or she had been involved in other stages of the case.[9] Adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality,[10] and only in the rarest circumstances evidence the degree of favoritism or antagonism required.[11] The principle applies even to misjudgments: a judge's erroneous rulings will not ordinarily be enough to warrant a writ of mandamus to the judge to recuse himself or herself,[12] and a judge to whom a case is reversed and remanded is not immediately suspected of being predisposed against a party.[13]

Observation:

An extrajudicial source is not the exclusive basis for establishing disqualifying bias or prejudice under the recusal statute.[14] In addition, an exception to the rule can occur when the movant demonstrates pervasive bias and prejudice.[15]

Footnotes

1 28 U.S.C.A. § 455(a).

2 Thomas v. Tenneco Packaging Co., Inc., 293 F.3d 1306, 53 Fed. R. Serv. 3d 318 (11th Cir. 2002).
The "extrajudicial source" doctrine applies to 28 U.S.C.A. § 455(a). Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

3 Andrade v. Chojnacki, 338 F.3d 448 (5th Cir. 2003).

4 U.S. v. Sammons, 918 F.2d 592 (6th Cir. 1990).

5 U.S. v. Sciarra, 851 F.2d 621, 12 Fed. R. Serv. 3d 249 (3d Cir. 1988).

6 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).
As to judicial comments in the course of proceedings, see § 62.

7 U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012); Redding v. ProSight Specialty Management Co., Inc., 90 F. Supp. 3d 1109 (D. Mont. 2015).

8 28 U.S.C.A. § 455(a).

9 U.S. v. Ayala, 289 F.3d 16 (1st Cir. 2002); U.S. v. Giordano, 442 F.3d 30 (2d Cir. 2006), for additional opinion, see, 172 Fed. Appx. 340 (2d Cir. 2006).

10 U.S. v. Amedeo, 487 F.3d 823 (11th Cir. 2007); In re Ocean 4660, LLC, 534 B.R. 52 (Bankr. S.D. Fla. 2015).

11 Feingold v. Quinn, 558 Fed. Appx. 278 (3d Cir. 2014); U.S. v. Scott, 630 Fed. Appx. 745 (10th Cir. 2015), cert. denied, 136 S. Ct. 1225, 194 L. Ed. 2d 224 (2016); Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

12 In re U.S., 441 F.3d 44 (1st Cir. 2006).

13 U.S. v. Walker, 920 F.2d 513 (8th Cir. 1990); U.S. v. Amedeo, 487 F.3d 823 (11th Cir. 2007).

14 In re U.S., 441 F.3d 44 (1st Cir. 2006); Bell v. Johnson, 404 F.3d 997, 2005 FED App. 0182P (6th Cir. 2005).

15 Thomas v. Tenneco Packaging Co., Inc., 293 F.3d 1306, 53 Fed. R. Serv. 3d 318 (11th Cir. 2002); Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).
As to pervasive bias, see § 76.

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 62. Effect of judicial comments in course of proceedings and courtroom administration on whether judge's impartiality might be questioned

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Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954

Under normal circumstances, a judge is not disqualified by comments he or she makes during the course of judicial proceedings.[1] Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge,[2] but such remarks (1) may do so if they reveal an opinion that derives from an extrajudicial source,[3] and (2) will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.[4] A party is not entitled to recusal merely because a judge is "exceedingly ill disposed" toward them, where the judge's knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.[5] Thus, the expression of opinions formed by a judge on the basis of facts or events occurring in the course of a proceeding, or prior proceedings, do not constitute a basis for a partiality disqualification motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible,[6] and this applies to criminal

proceedings as well.[7] A party's disagreement with the judge over the law is not grounds for disqualification, and the fact that a judge uses strong language in a ruling does not indicate bias.[8]

A trial judge's extreme negative comments in denying a motion for recusal bias or prejudice do not constitute grounds for disqualification for impartiality, where there was no indication that the judge has prejudged the case or that he or she will not be able to keep his or her likes and dislikes from intruding upon the duty to ensure a fair trial.[9] However, a trial judge should not accept reassignment to a case after recusing him or herself, where the judge has criticized the recusal motion and disclosed his or her intended resolution of the case, since after such comments the judge's impartiality would thereafter be susceptible of doubt.[10]

Judges have discretion in running their cases, and a judge's ordinary efforts at courtroom administration, even a stern and short-tempered judge's ordinary efforts at courtroom administration, remain immune as grounds for recusal.[11] Expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display, do not in themselves establish bias or partiality, as would warrant recusal.[12] When a party seeks to establish bias or prejudice from court conduct, as would warrant recusal, the party must show that the judge had a disposition so extreme as to display a clear inability to render a fair judgment.[13]

Footnotes

1 Andrade v. Chojnacki, 338 F.3d 448 (5th Cir. 2003); U.S. v. Iacaboni, 52 F. Supp. 3d 365 (D. Mass. 2014) (complimentary remarks to counsel); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).

2 Walsh v. Comey, 110 F. Supp. 3d 73 (D.D.C. 2015).
As to effect of hostility toward attorney on whether judge's impartiality might be questioned, see § 65.

3 As to the extrajudicial source rule, see § 61.

4 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

5 In re Steward, 828 F.3d 672 (8th Cir. 2016).

6 Douglas v. Houston Housing Authority, 587 Fed. Appx. 94 (5th Cir. 2014); United States v. Minard, 856 F.3d 555 (8th Cir. 2017); HPC US FUND 1, L.P. v. Wood, 182 F. Supp. 3d 1284 (S.D. Fla. 2016).
Impartiality could reasonably be questioned where the judge repeatedly expressed discomfort with the manner in which the indictment pulled various criminal acts, including witness-tampering plots, together under the umbrella of RICO charges. U.S. v. Bergrin, 682 F.3d 261, 88 Fed. R. Evid. Serv. 921 (3d Cir. 2012).

7 U.S. v. Gamboa, 439 F.3d 796, 69 Fed. R. Evid. Serv. 675 (8th Cir. 2006).

8 Obert v. Republic Western Ins. Co., 190 F. Supp. 2d 279 (D.R.I. 2002).

9 In re Cooper, 821 F.2d 833 (1st Cir. 1987).

10 Easter v. Jeep Corp., 750 F.2d 520, 40 Fed. R. Serv. 2d 600 (6th Cir. 1984).

11 In re City of Milwaukee, 788 F.3d 717 (7th Cir. 2015); In re Nicole Energy Services, Inc., 423 B.R. 840 (Bankr. S.D. Ohio 2010).

12 Farmer v. Banco Popular of North America, 791 F.3d 1246 (10th Cir. 2015).

13 U.S. v. Melton, 738 F.3d 903 (8th Cir. 2013).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 63. Effect of hostility toward attorney on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1), 49(2)

There may be instances where a judge's attitude toward a particular attorney is so hostile that the judge's impartiality concerning the attorney's client might reasonably be questioned.[1] However, such situations are rare, and ordinarily, a controversy between a trial judge and an attorney for parties to an action does not require disqualification in the absence of a showing of bias or personal prejudice against the parties.[2] While an attorney's credibility with the court is not irrelevant to the course of a trial, during which counsel may be required to make proffers concerning what the evidence is likely to be, which proffers may affect the timing or admissibility of evidence, a judge's statement that an attorney has no credibility is not in and of itself grounds for disqualification for impartiality.[3] Judicial remarks during the course of trial which are critical or disapproving of, or even hostile to, counsel, the parties, or their cases ordinarily do not support a bias or partiality challenge,[4] but may do so if they reveal an opinion that derives from an extrajudicial source, and will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.[5]

Observation:

To decide whether a judge is disqualified from hearing a case on the ground that his or her impartiality might reasonably be questioned, a court must inquire whether the judge is biased against a party, not whether the judge is annoyed with the party's counsel.[6]

Even where the judge's attitude toward, and treatment of, counsel may not be sufficiently adverse to cause the judge's disqualification for bias, it may still be proper for the judge to recuse him or herself for impartiality where the interests of justice may require that the cause be tried before another judge in an effort to avoid stress, trouble, and complications at trial, and conflicts with counsel.[7]

Footnotes

1 U.S. v. Kelley, 712 F.2d 884 (1st Cir. 1983).

2 In re Cooper, 821 F.2d 833 (1st Cir. 1987).

3 In re Cooper, 821 F.2d 833 (1st Cir. 1987).

4 Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).
A judge's warning to attorneys fell into the category of ordinary courtroom administration and was made to avoid waste of time and distraction from the principal issues. In re City of Milwaukee, 788 F.3d 717 (7th Cir. 2015).
As to judicial comments in the course of proceedings, see § 62.

5 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); In re Wilborn, 401 B.R. 848, 49 A.L.R.6th 669 (Bankr. S.D. Tex. 2009).
As to the extrajudicial source rule and adverse rulings, see § 61.

6 Gomez v. St. Jude Medical Daig Div. Inc., 442 F.3d 919 (5th Cir. 2006).

7 U.S. v. Ritter, 540 F.2d 459 (10th Cir. 1976).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 64. Effect of ex parte contacts or consideration of evidence on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

Ex parte contacts are improper where, given all the circumstances, they could cause a reasonable person to question that judge's impartiality.[1] However, while ex parte communications are discouraged, they are not always improper and do not necessarily call for recusal.[2] A judge's ex parte communications and use of court-appointed experts are generally not considered the type of extrajudicial conduct which can create the appearance of partiality and thus require disqualification.[3] There is no appearance of partiality created by the court's contacts, during the remedial stage of the case, with pertinent parties to implement obligations already imposed by prior valid court orders.[4]

However, it is grounds for disqualification that in a criminal prosecution a judge or magistrate has before him or her on the bench a copy of the arresting officer's report of the incident that has not been admitted into evidence, despite the judge or magistrate's declaration that he or she has not read the report.[5] Further, a federal judge hearing consolidated asbestos-related bankruptcy cases was irreversibly tainted, warranting disqualification from some of the cases, by a structural conflict of interest arising from the fact that two neutral advisors to the judge simultaneously served as advocates in an unrelated asbestos-related bankruptcy, representing future asbestos personal injury claimants, as the judge's extensive ex parte discussions with the advisors covered all major issues in the consolidated cases, the advisors held wide-ranging responsibilities in the consolidated cases including one advisor's drafting of legal opinions, and extensive and substantive ex parte meetings with the parties added to the questionableness of impartiality.[6]

Footnotes

1 Blixseth v. Yellowstone Mountain Club, LLC, 742 F.3d 1215 (9th Cir. 2014).

2 In re Whitchurch, 639 Fed. Appx. 772 (3d Cir. 2016); In re Adbox, Inc., 234 Fed. Appx. 420 (9th Cir. 2007); U.S. v. Scrushy, 721 F.3d 1288 (11th Cir. 2013).
As to ex parte contacts and personal bias or prejudice, see § 81.

3 Bradley v. Milliken, 620 F.2d 1143 (6th Cir. 1980); Jackson v. Fort Stanton Hosp. and Training School, 757 F. Supp. 1231 (D.N.M. 1990).

4 U.S. v. Yonkers Bd. of Educ., 946 F.2d 180 (2d Cir. 1991).

5 U.S. v. Van Griffin, 874 F.2d 634, 27 Fed. R. Evid. Serv. 1387 (9th Cir. 1989).

6 In re Kensington Intern. Ltd., 368 F.3d 289 (3d Cir. 2004).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(1) General Considerations

§ 65. Effect of activity in other cases or proceedings on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

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Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651

Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954

Forms

Forms relating to judge as former prosecutor, see Federal Procedural Forms, Criminal Procedure [Westlaw® Search Query]

Disqualification pursuant to the impartiality provision of the general disqualification statute[1] generally cannot be premised on judicial rulings in the course of the trial of other proceedings.[2] As a general rule, judges are not disqualified from trying defendants of whom, through prior judicial proceedings, they have acquired a low opinion, because they are expected to be able to keep their likes and dislikes from intruding upon their duty to ensure a fair trial.[3]

Mere representations and opinions about a previous unrelated matter, made before the judge had taken the oath of office, do not disqualify a judge from hearing a case.[4]

As is the case with circumstances which arise in the case at hand, circumstances may arise where a judge's participation in prior proceedings may give rise to an appearance of lack of impartiality in the instant case.[5] Thus, an exception to the general rule can occur when the movant demonstrates pervasive bias and prejudice resulting from actions or occurrences in a previous case.[6] Moreover, it is possible for the appearance of bias against a criminal defendant to originate from statements made considering the defendant in sentencing him or her in a prior criminal trial.[7] On the other hand, the recusal of a judge whose name was added mistakenly and without his knowledge to a pro forma motion to file an amicus brief in a similar suit against some of the same defendants, prior to his appointment to the bench, was not required.[8]

Observation:

While not required to do so by statute, a judge would recuse himself from sentencing a former speaker of a State House of Representatives, convicted of accepting bribes, after having participated as an attorney in a suit against the speaker, in his official capacity, challenging legislative redistricting, and having presided over the trial of a third person alleged to have engaged in illegal conspiracy with the speaker on another matter; recusal was warranted due to the unique procedural posture of the case and related state court case, the public need for cloture on the case having a high degree of public interest, and the need to reduce cynicism and promote public confidence in the administration of justice.[9]

In addition, a judge to whom a petition for habeas corpus is directed should recuse him or herself under the impartiality provision[10] if the judge discovers that he or she was a member of the panel of the state appellate court that affirmed the defendant's conviction on direct appeal,[11] or if the judge presided over the trial and conviction while still on the state court bench.[12] However, recusal is not required when a district judge sat on the state court of appeals but did not take part in any appeal of the merits of the conviction.[13]

A judge's impartiality could not reasonably be questioned in a motorist's civil rights action arising out of a traffic stop and arrest on the basis of the judge's previous affiliation 15 years earlier with the law firm in which the county attorney was a member.[14] On the other hand, a district court judge was required to disqualify himself for partiality in a civil action against an employer, based on the fact that his former law partner had represented the employer in the original negligence suit 25 years earlier and that the judge had represented the employer's workers' compensation insurer 27 years earlier.[15] Similarly, a judge's participation in his prior role as District Counsel for Immigration and Naturalization Service in the defendant's original deportation case would lead a reasonable, well-informed observer to question his impartiality in adjudicating the defendant's illegal reentry prosecution and sentencing, and thus produced the appearance of bias that required the judge to recuse himself in the prosecution and sentencing.[16]

Observation:

There is no rule that requires a judge to recuse him or herself from a case, civil or criminal, for impartiality simply because the judge was or is involved in litigation with one of the parties.[17]

Footnotes

1 28 U.S.C.A. § 455(a).

2 In re Davies, 655 Fed. Appx. 939 (3d Cir. 2016); U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012).
As to the extrajudicial source rule and adverse rulings, see § 61.

3 U.S. v. Pulido, 566 F.3d 52 (1st Cir. 2009) (sentencing judge was not required to recuse himself).

4 Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).

5 In re Cooper, 821 F.2d 833 (1st Cir. 1987).

6 McWhorter v. City of Birmingham, 906 F.2d 674, 30 Fed. R. Evid. Serv. 957 (11th Cir. 1990).
As to pervasive bias, see § 76.

7 U.S. v. Chantal, 902 F.2d 1018 (1st Cir. 1990).

8 Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., Inc., 535 U.S. 229, 122 S. Ct. 1290, 152 L. Ed. 2d 346 (2002).

9 U.S. v. Black, 490 F. Supp. 2d 630 (E.D. N.C. 2007).

10 28 U.S.C.A. § 455(a).

11 Russell v. Lane, 890 F.2d 947, 15 Fed. R. Serv. 3d 217 (7th Cir. 1989).

12 Clemmons v. Wolfe, 377 F.3d 322 (3d Cir. 2004).

13 Tyler v. Purkett, 413 F.3d 696 (8th Cir. 2005).

14 Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004).

15 Patterson v. Mobil Oil Corp., 335 F.3d 476 (5th Cir. 2003).

16 United States v. Herrera-Valdez, 826 F.3d 912 (7th Cir. 2016).

17 In re Taylor, 417 F.3d 649 (7th Cir. 2005).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 66. Effect of federal judge's beliefs or extrajudicial knowledge on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1), 49(2)

A judge will not be disqualified for a "conscious or unconscious belief."[1] Neither will a judge be disqualified for impartiality[2] because he or she may have personal knowledge of similar, but unrelated incidents.[3] A trial judge's recollections of private law practice and his knowledge of and beliefs about the law derived over decades of practice are not extrajudicial sources of information that would justify recusal.[4] Similarly, a judge's general views on matters of policy do not require recusal in a case where such a policy may come into play.[5] Moreover, disqualification of a judge for impartiality is not required for recusal based only on assumptions about a judge's beliefs that are not substantiated by the facts of record.[6]

A judge will not ordinarily be disqualified on the grounds of mere familiarity with a defendant, or the type of charge, or the kind of defense presented.[7]

Footnotes

1 U.S. v. Bennett, 539 F.2d 45 (10th Cir. 1976).

2 28 U.S.C.A. § 455(a).

[3] U.S. v. Clark, 398 F. Supp. 341 (E.D. Pa. 1975), aff'd, 532 F.2d 746 (3d Cir. 1976) and aff'd, 532 F.2d 745 (3d Cir. 1976) and aff'd, 532 F.2d 748 (3d Cir. 1976).

[4] Redding v. ProSight Specialty Management Co., Inc., 90 F. Supp. 3d 1109 (D. Mont. 2015).

[5] In re City of Milwaukee, 788 F.3d 717 (7th Cir. 2015); U.S. v. Payne, 944 F.2d 1458, 33 Fed. R. Evid. Serv. 1316 (9th Cir. 1991).

[6] In re McCarthey, 368 F.3d 1266 (10th Cir. 2004).

[7] U.S. v. Ayala, 289 F.3d 16 (1st Cir. 2002); Clemens v. U.S. Dist. Court for Central Dist. of California, 428 F.3d 1175 (9th Cir. 2005).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 67. Effect of federal judge's political or religious associations, activities, or affiliations on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1), 49(2)

A.L.R. Library

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73

Generally, a judge is not disqualified from deciding a case because of views about, or differences over, abstract policy issues.[1] Past political activity alone will rarely require recusal,[2] nor is recusal warranted where a judge is alleged to be biased based solely on political connections to the President who appointed her.[3] Former membership in organizations such as the Sierra Club, the Anti-Defamation League of B'nai B'rith, and the NAACP does not of itself form a reasonable basis for questioning a judge's impartiality, even though such groups often engage in adversary proceedings in federal court.[4]

A judge's religious affiliation does not mandate his or her disqualification,[5] even though the judge's church has taken a policy position on matters which may be presented in a lawsuit pending before the judge, if the judge's church places him or her under no obligation to interpret the law in any manner other than that required under the Constitution.[6]

Footnotes

1 Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482 (1st Cir. 1989) (statehood of Puerto Rico).

2 Higganbotham v. Oklahoma ex rel. Oklahoma Transp. Com'n, 328 F.3d 638 (10th Cir. 2003).

3 Armenian Assembly of America, Inc. v. Cafesjian, 783 F. Supp. 2d 78 (D.D.C. 2011).

4 Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988).

5 Scenic Holding, LLC v. New Board of Trustees of Tabernacle Missionary Baptist Church, Inc., 506 F.3d 656 (8th Cir. 2007); In re McCarthey, 368 F.3d 1266 (10th Cir. 2004).

6 State of Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 68. Effect of federal judge's personal and professional relationships, acquaintanceships, or activities on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 49(1)

A.L.R. Library

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700

Judge's membership in bar association as ground for disqualification under 28 U.S.C.A. sec. 455, 42 A.L.R. Fed. 331

Construction and application of 28 U.S.C.A. sec. 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned, 40 A.L.R. Fed. 954

Generally, a federal judge is not required to recuse when he or she has a casual, nonbusiness relationship with a victim, attorney, witness, or litigant appearing before the court.[1] Remote or inconsequential associations or acquaintances between a judge and persons associated with a proceeding before the judge are not grounds for recusal.[2] The mere fact that a witness,

especially a minor witness, might be a friend, acquaintance,[3] or colleague of the judge does not normally require recusal.[4] This is the general rule because it is recognized that the public understands that judges are usually longstanding members of the community in which they serve and although they will inevitably encounter witnesses with whom they, or people close to them, have had positive or negative experiences, judges can and will ordinarily ignore those experiences and decide the matters before them impartially.[5] While friendship between a litigant and a Supreme Court Justice is a ground for recusal of the Justice where the personal fortune or the personal freedom of the litigant is at issue, it is traditionally not a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the government officer.[6] However, recusal is required when the level of a personal relationship increases to the point that a judge cannot be impartial, or a reasonable person would question the judge's impartiality.[7] Further, where the outcome of a proceeding depends on the credibility of an acquaintance of a district court judge, the concern over the appearance of impartiality is heightened.[8]

Observation:

A post made from a social media account allegedly owned by the judge that "followed" a public social media account maintained by counsel for a party did not create an appearance of bias requiring recusal of the judge.[9]

Where a judge has a business relationship with counsel for a party to a proceeding, the judge's impartiality is reasonably questionable, for purposes of recusal.[10] Also, business interactions between defendants and another judge of a district court, which might be relevant to the case, may result in an appearance of partiality on the part of the trial judge.[11]

If a judge's relative is an associate in a law firm, and the relative's compensation is in no manner dependent upon the result of a particular case before a judge, recusal for impartiality is not mandated.[12] Recusal is not required merely because a relative was or is involved in other litigation concerning the same general subject matter that is before the court.[13] However, a judge who is married to a magistrate judge should recuse him or herself so that another judge can review the magistrate judge's report and recommendation in a habeas corpus case.[14]

A judge's professional associations[15] and activities, such as lecturing at a law school, do not disqualify the judge from hearing a case involving the dean of that law school.[16] When the issue on a recusal motion on a claim of lack of impartiality involves the judge's participation in an educational program, matters that provide important context for the challenged aspects of the judge's remarks also must be considered; that context includes everything the judge said during the program, and the judge's role in other programs with other perspectives also is among the facts that should be considered in determining whether a reasonable person would question his impartiality.[17] Neither inconsequential alumni contacts[18] nor that the judge attended or graduated from a college or law school which is a party is a reasonable basis for questioning the judge's impartiality.[19] On the other hand, a judge's presence on the board of trustees of a university which has a financial interest in the outcome of a case over which the judge is presiding is sufficient to bring the judge's impartiality into question.[20] Similarly, the accumulation of a judge's connections to litigation may endanger the appearance of neutrality that is essential for the judiciary to retain the public's trust, and thus recusal is warranted, where the judge served on a civic board that received financial support from a party, the judge's service on the board brought her into regular contact with numerous individuals involved in the lawsuit, and a party also served on the board with the judge.[21] However, where the trial judge disclosed to the parties that his wife was a tenured faculty member of the same law school with which the plaintiff's attorneys were affiliated, the judge could accept the defendants' waiver of recusal on the grounds of such shared affiliation.[22]

Government counsel's small courtesies to the court's nonjudicial staff over the course of a trial, such as occasionally giving T-shirts, food, beverages, cookies, and candies to employees in the federal clerk's, marshal's, and court reporter's office could not be viewed by any objective observer as compromising the judge's independence, as would require his disqualification in a case against the government.[23]

CUMULATIVE SUPPLEMENT

Cases:

Capital murder defendant failed to present evidence sufficient to create reasonable doubt as to validity of presumption that trial judge was both qualified and unbiased, as required to obtain trial judge's recusal, although trial judge had authored letter to county board of supervisors asserting "that the appointment [of] private attorneys [was] necessary because" defendant's counsel, an assistant public defender, was "both an incompetent and non law-abiding attorney[,]" where Supreme Court had, in a separate case, found no sufficient basis to order trial judge's recusal, and following Supreme Court's order in the separate case defendant did not again seek trial judge's recusal, but instead agreed to retain public defender's office. Thomas v. State, 249 So. 3d 331 (Miss. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Bobo, 395 F. Supp. 2d 1116 (N.D. Ala. 2004); U.S. v. Sundrud, 397 F. Supp. 2d 1230 (C.D. Cal. 2005).

2 U.S. v. Jacobs, 311 Fed. Appx. 535 (3d Cir. 2008); U.S. v. Angelus, 258 Fed. Appx. 840 (6th Cir. 2007); Smith v. Bender, 350 Fed. Appx. 190 (10th Cir. 2009); In re Keenan, 372 B.R. 496 (Bankr. S.D. Cal. 2007).

3 Garafola v. U.S., 909 F. Supp. 2d 313 (S.D. N.Y. 2012).

4 U.S. v. Akinlade, 519 Fed. Appx. 529 (11th Cir. 2013) (neighbors); U.S. v. O'Brien, 18 F. Supp. 3d 25 (D. Mass. 2014).

5 United States v. Jordan, 678 Fed. Appx. 759 (10th Cir. 2017), petition for certiorari filed (U.S. June 7, 2017); United States v. Sampson, 148 F. Supp. 3d 75 (D. Mass. 2015), adhered to on reconsideration, 2015 WL 13333677 (D. Mass. 2015).

6 Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 124 S. Ct. 1391, 158 L. Ed. 2d 225 (2004).

7 U.S. v. Amico, 486 F.3d 764 (2d Cir. 2007); U.S. v. Sundrud, 397 F. Supp. 2d 1230 (C.D. Cal. 2005).

8 Jorgensen v. Cassiday, 320 F.3d 906, 55 Fed. R. Serv. 3d 460 (9th Cir. 2003).

9 United States v. Sierra Pacific Industries, Inc., 862 F.3d 1157 (9th Cir. 2017).

10 U.S. v. Bobo, 395 F. Supp. 2d 1116 (N.D. Ala. 2004).

11 U.S. v. Gordon, 354 F. Supp. 2d 524 (D. Del. 2005).

12 U.S. v. Bobo, 395 F. Supp. 2d 1116 (N.D. Ala. 2004).
As to interest of judge's relative in case as ground for recusal, see §§ 92 to 99.

13 Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011).
A judge was not required to recuse himself from a criminal trial on the ground that his impartiality might reasonably be questioned based on the fact that the judge's son served as the United States Attorney when an investigation into the defendant's alleged crime began. United States v. Quinones, 201 F. Supp. 3d 789 (S.D. W. Va. 2016).

14 Sanders v. Cockrell, 71 Fed. Appx. 296 (5th Cir. 2003).

15 Marcavage v. Board of Trustees of Temple University of Commonwealth System of Higher Educ., 232 Fed. Appx. 79, 222 Ed. Law Rep. 625 (3d Cir. 2007).

16 MacNeil Bros. Co. v. Cohen, 264 F.2d 186 (1st Cir. 1959).

17 United States v. King, 661 Fed. Appx. 150 (3d Cir. 2016); United States v. Sampson, 148 F. Supp. 3d 75 (D. Mass. 2015), adhered to on reconsideration, 2015 WL 13333677 (D. Mass. 2015).

18 U.S. v. Adams, 2009 WL 62170 (M.D. Pa. 2009).

19 Harris v. Board of Sup'rs of Louisiana State University & Agr. & Mechanical College ex rel. LSU Health Science Center Shreveport, 409 Fed. Appx. 725, 266 Ed. Law Rep. 636 (5th Cir. 2010); Chalenor v. University of North Dakota, 291 F.3d 1042, 165 Ed. Law Rep. 495 (8th Cir. 2002).

20 Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855, 47 Ed. Law Rep. 366, 11 Fed. R. Serv. 3d 433 (1988).

21 In re Apollo, 535 Fed. Appx. 169 (3d Cir. 2013).

22 Fideicomiso De La Tierra del Cano Martin Pena v. Fortuno, 631 F. Supp. 2d 134 (D.P.R. 2009).
As to waiver of disqualification of federal judge, see § 52.

23 Andrade v. Chojnacki, 338 F.3d 448 (5th Cir. 2003).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 69. Effect of federal judge's personal and professional relationships, acquaintanceships, or activities on whether judge's impartiality might be questioned—Judge's law clerk

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 49(1)

A.L.R. Library

Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate, 65 A.L.R. Fed. 775

Even if the judge has no reason to recuse herself based upon her own circumstances,[1] the activities and associations of a judge's law clerk can create a sufficient appearance of partiality that the judge should disqualify him or herself for impartiality[2] if the clerk participates in the case.[3] If a law clerk continues to work on the case in which his or her impartiality might reasonably be questioned, the clerk's actual or potential conflict may be imputed to the judge,[4] such that the judge could be required to disqualify himself.[5] Ministerial tasks performed by the judge's law clerk do not create the appearance of impropriety, as the basis for judicial recusal.[6] The conflict presented by a judge's law clerk's relation or association with counsel representing a party has been described as relatively weak and remote in most cases,[7] although when the relationship is a close one, such as that of a sibling, disqualification is more likely to be appropriate.[8] In particular, the clerk's continuing participation with a judge or magistrate in a case in which the clerk's future employers are acting as counsel, whether or not

the clerk actually affects the decision,[9] or even participation after being offered employment by one of the counsel in a pending case,[10] gives rise to an appearance of partiality. A combination of activities and associations on the part of a clerk can require the judge's disqualification where one of them in isolation would not.[11]

Practice Tip:

Where a law clerk's participation in the case would create an appearance of lack of impartiality, the usual solution is to remove the clerk from participation in the case, not to disqualify the judge.[12] Alternatively, the parties may waive the ground for disqualification if fully informed of the facts.[13]

The mere fact that a party in a particular case is represented by an attorney who was formerly a law clerk for the judge hearing the case generally does not require the disqualification of the judge.[14]

Footnotes

1 As to effect of federal judge's personal and professional relationships, acquaintanceships, or activities on whether judge's impartiality might be questioned, see § 68.

2 28 U.S.C.A. § 455(a).

3 Trammel v. Simmons First Bank of Searcy, 345 F.3d 611 (8th Cir. 2003); Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297 (10th Cir. 2015); Doe v. Cabrera, 134 F. Supp. 3d 439 (D.D.C. 2015).

4 Xyngular Corporation v. Schenkel, 160 F. Supp. 3d 1290 (D. Utah 2016).

5 Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297 (10th Cir. 2015).

6 U.S. v. Martinez, 446 F.3d 878 (8th Cir. 2006); Doe v. Cabrera, 134 F. Supp. 3d 439 (D.D.C. 2015).

7 Xyngular Corporation v. Schenkel, 160 F. Supp. 3d 1290 (D. Utah 2016).

8 In re Allied-Signal Inc., 891 F.2d 967 (1st Cir. 1989).

9 Hall v. Small Business Admin., 695 F.2d 175, 65 A.L.R. Fed. 766 (5th Cir. 1983).

10 Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703, 11 U.C.C. Rep. Serv. 2d 558 (9th Cir. 1990).

11 Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988).

12 Mathis v. Huff & Puff Trucking, Inc., 787 F.3d 1297 (10th Cir. 2015); Doe v. Cabrera, 134 F. Supp. 3d 439 (D.D.C. 2015).

13 Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988).

14 Smith v. Pepsico, Inc., 434 F. Supp. 524 (S.D. Fla. 1977).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 70. Effect of federal judge's former employment on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 47(1), 49(1)

A.L.R. Library

Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case, 85 A.L.R.5th 471

Where a judge previously served as an attorney in a case presently before the judge, the judge's disqualification under the impartiality provision of the general disqualification statute[1] may be appropriate.[2] Similarly, a judge's participation in his prior role as District Counsel for the Immigration and Naturalization Service in a defendant's original deportation case would lead a reasonable, well-informed observer to question his impartiality in adjudicating the defendant's illegal reentry prosecution and sentencing.[3]

Ordinarily, however, a judge's prior position as a United States Attorney does not require the judge's recusal on any grounds unless the case at issue arose before the judge left that position.[4] Moreover, disqualification may not be required where the district judge explicitly states that he or she never participated as counsel or advisor or expressed any opinion concerning the

case against the defendant and where the defendant has not offered any evidence, aside from the judge's former position in the office of the United States Attorney, tending to show that a reasonable person knowing all the circumstances would harbor doubts concerning the judge's impartiality.[5]

Recusal may be required where prior to being appointed to the bench the trial judge was associated with a law firm representing a client who, while not a party to the instant litigation, would be subject to a potential claim for indemnification should judgment be rendered against the defendant.[6] However, the fact that the judge once represented a party in the instant case in unrelated matters several years before does not forever prevent the judge from sitting in a case in which that corporation is a party.[7] The prior representation of a party by a judge or his law firm, with regard to a matter unrelated to the litigation before the judge, does not automatically require recusal based on a reasonable question regarding the judge's impartiality.[8] A mere prior association does not form a reasonable basis for questioning a judge's impartiality.[9]

Observation:

A judge should be disqualified because his or her impartiality may reasonably be questioned if the judge heard the same matter as a state judge.[10]

Footnotes

1 28 U.S.C.A. § 455(a).

2 U.S. v. Gipson, 835 F.2d 1323 (10th Cir. 1988); U.S. v. Pepper & Potter, Inc., 677 F. Supp. 123 (E.D. N.Y. 1988). As to prior practice or employment as grounds for disqualification, see §§ 88, 89.

3 United States v. Herrera-Valdez, 826 F.3d 912 (7th Cir. 2016).

4 Edelstein v. Wilentz, 812 F.2d 128 (3d Cir. 1987); Diaz v. King, 687 Fed. Appx. 709 (10th Cir. 2017).

5 U.S. v. Di Pasquale, 864 F.2d 271, 110 A.L.R. Fed. 669 (3d Cir. 1988).

6 Preston v. U.S., 923 F.2d 731 (9th Cir. 1991).

7 Green v. New York City Health and Hospitals Corp., 343 Fed. Appx. 712 (2d Cir. 2009); Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., 690 F.2d 1157, 35 Fed. R. Serv. 2d 268 (5th Cir. 1982).

8 Philip Morris USA Inc. v. United States Food and Drug Administration, 156 F. Supp. 3d 36 (D.D.C. 2016); Fharmacy Records v. Nassar, 572 F. Supp. 2d 869 (E.D. Mich. 2008); Lipin v. Hunt, 573 F. Supp. 2d 830, 71 Fed. R. Serv. 3d 708 (S.D. N.Y. 2008); U.S. v. Black, 490 F. Supp. 2d 630 (E.D. N.C. 2007).

9 Allphin v. U.S., 758 F.3d 1336 (Fed. Cir. 2014); U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011).

10 Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 71. Effect of federal judge's negotiation for future employment on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

Recusal is required under the impartiality provision of the general disqualification statute[1] when, at the time a case is about to go to trial before a judge, he or she is in negotiation, however preliminary, tentative, indirect, unintentional, or ultimately unsuccessful, with a lawyer or law firm or party in the case over future employment.[2] While the case is clear enough if the negotiation is with only one side in the case, the appearance of partiality is not purged completely even when the negotiations extend to both parties, although the element of bias is less distinct.[3] The appearance of equal justice requires that the judge not be exploring the prospects of employment with one lawyer or all lawyers appearing in a case before him or her.[4]

On the other hand, a federal appellate judge's prior conversation with a law firm representing one of the parties on an appeal, which concerned the judge's possible future employment with the firm following his retirement, did not warrant the judge's recusal, as some five years had passed since the conversation, the discussions were of a very general nature, and there had been no further contact.[5]

Footnotes

[1] 28 U.S.C.A. § 455(a).

[2] Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985).

[3] Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985).

[4] Pepsico, Inc. v. McMillen, 764 F.2d 458 (7th Cir. 1985).
Bankruptcy judge's actions shortly after granting debtor's summary judgment motion in adversary proceeding, in accepting partnership in law firm representing debtor and publicly praising debtor's president, created appearance of impropriety amounting to reversible error. Matter of Continental Airlines, 981 F.2d 1450 (5th Cir. 1993).

[5] In re CBI Holding Co., Inc., 424 F.3d 265 (2d Cir. 2005).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 72. Effect of criticism, threats, or actions directed at federal judge on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

The courts will generally reject recusal motions based on and effectively created by the litigant's deliberate act of criticizing the judge or judicial system, or of criticizing a person associated with the judge.[1] Thus, a party cannot bring about the disqualification of a judge by delivering baseless personal attacks on the judge or bringing suits against the judge, or on the grounds of personal opinions or characterizations appearing in the media.[2] The mere fact that a judge is one of the numerous federal judges that a plaintiff has filed suit against is not sufficient to establish that his or her recusal from the case is warranted.[3]

Under ordinary circumstances threats or other attempts to intimidate a judge, without more, do not require disqualification for partiality.[4] When the alleged basis for recusal is a threat against the judge, the objective prong warrants recusal if a reasonable third-party observer would perceive that there is a significant risk that the judge will be influenced by the threat and resolve the case on a basis other than the merits.[5] Although a plot or threat, real or feigned, may create a situation in which a judge must recuse himself, recusal is not ordinarily or routinely required.[6] The judge must evaluate the risk that the threat will be carried out and the extent of harm realized if the threat is fulfilled.[7] If a judge feels he cannot hear a case without bias, on account of a threat, then the judge has a duty to recuse himself irrespective of how it looks to the public.[8] Several factors are helpful in determining whether a trial judge should recuse himself based on an alleged threat by the defendant: (1) the defendant's capacity to carry out the threat, including whether the defendant has taken "concrete steps" or has accomplices; (2) the defendant's demeanor and the context of the threat, including whether the defendant is serious in carrying out the

threat; (3) whether the perceived purpose of the threat is to force recusal and manipulate the judicial system; and (4) whether the threat results in any conduct by the court other than matter-of-course judicial rulings that could be viewed as prejudicial toward the defendant.[9]

Footnotes

1 Camacho v. Autoridad de Telefonos de Puerto Rico, 868 F.2d 482 (1st Cir. 1989); U.S. v. Owens, 902 F.2d 1154 (4th Cir. 1990); Akins v. Knight, 863 F.3d 1084 (8th Cir. 2017).

2 Clemens v. U.S. Dist. Court for Central Dist. of California, 428 F.3d 1175 (9th Cir. 2005).

3 Azubuko v. Royal, 443 F.3d 302 (3d Cir. 2006).

4 U.S. v. Beale, 574 F.3d 512 (8th Cir. 2009); S.E.C. v. Bilzerian, 729 F. Supp. 2d 19 (D.D.C. 2010).

5 In re Nettles, 394 F.3d 1001 (7th Cir. 2005); U.S. v. Spangle, 626 F.3d 488 (9th Cir. 2010).

6 In re Basciano, 542 F.3d 950 (2d Cir. 2008).

7 U.S. v. Spangle, 626 F.3d 488 (9th Cir. 2010).

8 U.S. v. Holland, 519 F.3d 909 (9th Cir. 2008).

9 U.S. v. Spangle, 626 F.3d 488 (9th Cir. 2010); U.S. v. Cordova, 806 F.3d 1085 (D.C. Cir. 2015).
A district judge and magistrate judge were not required to recuse themselves sua sponte from a case merely because they belonged to the same court as the magistrate judge that the defendant attempted to have murdered, where the defendant only specifically threatened the one magistrate judge, not the other magistrate judge, district judge, or court generally, and there was no evidence of close personal ties between the threatened judge and the nonthreatened judges. U.S. v. Spiker, 649 Fed. Appx. 770 (11th Cir. 2016).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

a. Impartiality of Judge Questioned

(2) Particular Grounds for Impartiality

§ 73. Effect of federal judge's financial interests on whether judge's impartiality might be questioned

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 42, 49(1)

Judges should disqualify themselves when their impartiality might reasonably be questioned or when they have a potential financial stake in the outcome of a decision.[1] A judge who holds a substantial interest in the corporate victim of a crime must disqualify him or herself in a subsequent criminal proceeding involving that crime, since the interest may raise the appearance of partiality.[2] If it is determined that the judge's interest in a crime victim does require recusal, the fact that the judge does not order restitution as part of the sentence does not obviate the ground for recusal.[3]

On the other hand, an interest which is remote, contingent, or speculative is not the kind of interest which reasonably brings into question a judge's impartiality.[4] No suspect appearance is created when, in the eyes of a reasonable person, the disqualifying financial interest is not easily ascertainable or otherwise apparent to the judge.[5] Thus, recusal is not required in every case in which a judge owns the stock of a company in the same industry as one of the parties to the case.[6] The fact that a judge who is receiving a military pension participates in a proceeding in which a military service is a party raises no reasonable basis for questioning the impartiality of the judge, assuming that the outcome of the case would not affect the amount of the judge's pension or his or her right to receive it.[7] Moreover, recusal is not required when the judge has divested him or herself of the stock and has waived any interest in the underlying claims,[8] even if the judge expresses "sadness" for his or her stock losses.[9]

Observation:

Not every appearance of a violation of the statute requiring a judge to disqualify him or herself when the judge has a financial interest in a party[10] creates a disqualification on the ground that the judge's impartiality might reasonably be questioned.[11] While the size of the financial interest is immaterial for purposes of the recusal statute's requirement of recusal in the specific circumstance of a judge knowing that his spouse has a financial interest in a party to the proceeding, the size may be considered under the statute's "catchall" provision, requiring a judge to disqualify himself in any proceeding in which his impartiality might be reasonably questioned, especially where the interest is in a nonparty.[12]

Footnotes

1 U.S. v. Amico, 486 F.3d 764 (2d Cir. 2007); Beer v. U.S., 696 F.3d 1174 (Fed. Cir. 2012); United States v. Farkas, 149 F. Supp. 3d 685 (E.D. Va. 2016), aff'd, 669 Fed. Appx. 122 (4th Cir. 2016) (the court had a disqualifying appearance of partiality due to personal financial losses she suffered during the global financial crisis).
As to disqualification of judge on basis of financial interest, see §§ 94 to 97.

2 U.S. v. Nobel, 696 F.2d 231, 12 Fed. R. Evid. Serv. 567 (3d Cir. 1982).

3 Hardy v. U.S., 878 F.2d 94 (2d Cir. 1989).

4 In re Drexel Burnham Lambert Inc., 861 F.2d 1307 (2d Cir. 1988); In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 305 F. Supp. 2d 323 (S.D. N.Y. 2004).
The fact that the judge's home and vehicle liability and casualty insurance was carried by a large, nationwide insurance company while the judge presided over a case in which another insured sued that company did not create an appearance of impropriety. Barth v. State Farm Fire and Cas. Co., 228 Ill. 2d 163, 319 Ill. Dec. 852, 886 N.E.2d 976 (2008).

5 Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120 (2d Cir. 2003).

6 In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986).

7 Maier v. Orr, 758 F.2d 1578 (Fed. Cir. 1985).

8 Killingsworth v. State Farm Mut. Auto. Ins. Co., 254 Fed. Appx. 634 (9th Cir. 2007).

9 In re Certain Underwriter, 294 F.3d 297 (2d Cir. 2002).

10 28 U.S.C.A. § 455(b)(4), discussed further in §§ 94 to 97.

11 Chase Manhattan Bank v. Affiliated FM Ins. Co., 343 F.3d 120 (2d Cir. 2003).

12 Exxon Mobil Corporation v. United States, 110 Fed. Cl. 407 (2013).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 74. Statutory basis for disqualification of federal judge for personal bias or prejudice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disqualification or Recusal of Judge Due to Comments at Continuing Legal Education (CLE) Seminar or Other Educational Meetings, 49 A.L.R.6th 93

Forms

Forms relating to judge bias, generally, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure; Federal Procedural Forms, Actions in District Court; Federal Procedural Forms, Criminal Procedure [Westlaw® Search Query]

A party may move to recuse a judge based on actual bias or prejudice, or an appearance of bias or prejudice.[1] Two separate

statutory provisions provide for the disqualification of a judge for personal bias or prejudice.[2]

Under the general disqualification statute,[3] a justice, judge, or magistrate judge must disqualify him or herself where he or she has a personal bias or prejudice concerning a party.[4] This provision requires a showing of bias in fact to support disqualification.[5] "Prejudice or bias," as would support disqualification of a judge, means a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it rests upon knowledge that the subject ought not possess or because it is excessive in degree.[6] As judges are presumed to rise above biasing influences,[7] a party seeking recusal bears a heavy burden to show that the judge displayed a deep-seated favoritism or antagonism, making fair judgment impossible.[8] Accordingly, under the statute any bias must be proven by compelling evidence,[9] and the issue is whether a reasonable person would be convinced the judge was biased.[10] The standard is an objective "reasonable person" standard, with reference to a well-informed, thoughtful and objective observer rather than to a hypersensitive, cynical and suspicious person.[11]

Under another statute specific to district courts, whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or her or in favor of any adverse party, such judge can proceed no further in that proceeding, and another judge must be assigned to hear such proceeding.[12] This provision requires a showing of actual bias,[13] which only personal animus or malice on the part of the judge can establish.[14] Recusal of the judge on the ground of personal bias or prejudice is mandatory if the moving papers are legally sufficient;[15] that makes this statute a powerful tool that could easily be abused, so its requirements are enforced strictly.[16]

Observation:

Despite the differences in terminology between these two statutes,[17] courts have consistently indicated that the substantive standards for personal bias and prejudice are identical.[18]

Footnotes

1 Brune v. Parrott, 570 B.R. 86 (E.D. Cal. 2017); Haskett v. Orange Energy Corporation, 161 F. Supp. 3d 471 (S.D. Tex. 2015).
As to interplay of disqualification statutes, see § 59.
As to appearance of impartiality, see §§ 58 to 73.

2 28 U.S.C.A. §§ 144, 455(b)(1).
As to disqualification and recusal statutes, generally, see § 43.

3 28 U.S.C.A. § 455(b)(1).

4 U.S. v. Patti, 337 F.3d 1317 (11th Cir. 2003); In re Lee, 561 B.R. 93 (B.A.P. 8th Cir. 2016).

5 U.S. v. Sciarra, 851 F.2d 621, 12 Fed. R. Serv. 3d 249 (3d Cir. 1988).

6 Burley v. Gagacki, 834 F.3d 606 (6th Cir. 2016).

7 Hoeft v. Dommisse, 352 Fed. Appx. 77 (7th Cir. 2009).

8 In re Lee, 561 B.R. 93 (B.A.P. 8th Cir. 2016).
As to determination of motion to disqualify or recuse federal judge and presumptions and burden of proof, see § 50.

[9] In re Sanders, 540 B.R. 911 (Bankr. S.D. Fla. 2015).

[10] Grove Fresh Distributors, Inc. v. John Labatt, Ltd., 299 F.3d 635 (7th Cir. 2002).

[11] In re Damerau, 525 B.R. 799 (Bankr. S.D. Fla. 2015).

[12] 28 U.S.C.A. § 144.

[13] Walsh v. F.B.I., 952 F. Supp. 2d 71 (D.D.C. 2013).

[14] Hoffman v. Caterpillar, Inc., 368 F.3d 709, 64 Fed. R. Evid. Serv. 498, 58 Fed. R. Serv. 3d 432 (7th Cir. 2004).

[15] Strange v. Islamic Republic of Iran, 46 F. Supp. 3d 78 (D.D.C. 2014).
As to procedural requirements and sufficiency for motion to recuse federal judge, see §§ 47 to 52.

[16] United States v. Betts-Gaston, 860 F.3d 525 (7th Cir. 2017).

[17] 28 U.S.C.A. §§ 144, 455(b)(1).

[18] U.S. v. Heffington, 952 F.2d 275 (9th Cir. 1991); Walsh v. F.B.I., 952 F. Supp. 2d 71 (D.D.C. 2013).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 75. Requirement that bias be extrajudicial and personal to disqualify federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

To be disqualifying the alleged bias and prejudice usually must result in an opinion on the merits on some basis other than what the judge learned from participation in the case,[1] or, as generally stated, the bias or prejudice necessary to warrant recusal of a judge must be personal and extrajudicial.[2] Extrajudicial conduct encompasses only personal bias as distinguished from a judicial one, arising out of the judge's background and association and not from the judge's view of the law.[3] Under this view, knowledge gained from the judge's discharge of his or her judicial function is not a ground for disqualification based on bias or prejudice.[4] Facts that a judge discovers in his judicial capacity are of a "judicial," rather than a "personal," nature and therefore do not stem from an "extrajudicial source," as required to provide a basis for the judge's recusal.[5] Predispositions developed during the course of a trial will sometimes, although rarely, suffice.[6]

"Personal" bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases.[7] A charge of personal bias or prejudice in general presupposes the existence of a mental attitude manifesting a predisposition in favor or against a particular person or thing.[8] As applied to a judge, the concept of personal bias or prejudice suggests that the judge has a wrongful or inappropriate inclination or preconceived opinion toward a person or matter that improperly sways judgment and renders the judge incapable of performing official duties fairly and impartially.[9] Recusal based upon actual bias or prejudice requires that a litigant present evidence of a negative bias or prejudice which must be grounded in some personal animus or malice that the judge harbors against him.[10] The most critical element of the principles of personal bias or prejudice is that the judge comes to the matter at hand already possessing the particular disqualifying leaning, as may be demonstrated by a clear record of expressions or other actions consistent with the improper disposition.[11]

Caution:

While the most common basis to show bias or prejudice on the part of the judge, of the kind warranting disqualification, is from an extrajudicial source, it is not the only basis to assert bias or prejudice; a favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" where, even though it springs from facts adduced or events occurring at trial, it is so extreme as to display a clear inability to render a fair judgment.[12] This is sometimes referred to as the "pervasive bias" exception to the extrajudicial source doctrine.[13]

CUMULATIVE SUPPLEMENT

Cases:

Denial of motion to recuse district judge for appearance of partiality based on judge's wife's purchase of life insurance policy in favor of university, wife's alma mater, to endow a scholarship for student athletes upon wife's death was warranted, in action brought by state-court litigant against university and others; neither judge nor any family member had financial interest in the litigation, as the wife's contribution was a donation, not an investment, wife's contribution was not tied to any activity related to the litigation, and judge himself was not involved with the contribution or the university. 28 U.S.C.A. § 455(a). Barnett v. Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., 956 F.3d 1228 (10th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); U.S. v. Nickl, 427 F.3d 1286, 68 Fed. R. Evid. Serv. 837 (10th Cir. 2005); Klayman v. Judicial Watch, Inc., 744 F. Supp. 2d 264 (D.D.C. 2010).
As to expressions of attitude or opinion made from the bench, see § 76.

2 U.S. v. Jamieson, 427 F.3d 394, 68 Fed. R. Evid. Serv. 825, 2005 FED App. 0430P (6th Cir. 2005); U.S. v. Amedeo, 487 F.3d 823 (11th Cir. 2007); In re Damerau, 525 B.R. 799 (Bankr. S.D. Fla. 2015).

3 U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

4 Omega Engineering, Inc. v. Omega, S.A., 432 F.3d 437 (2d Cir. 2005); Walsh v. Comey, 110 F. Supp. 3d 73 (D.D.C. 2015); Fairley v. Andrews, 423 F. Supp. 2d 800 (N.D. Ill. 2006).

5 In re Tyler, 498 B.R. 373 (Bankr. N.D. Ga. 2013).

6 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

7 Youn v. Track, Inc., 324 F.3d 409, 55 Fed. R. Serv. 3d 611, 2003 FED App. 0087P (6th Cir. 2003).

8 Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414 (S.D. N.Y. 2008).

9 Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414 (S.D. N.Y. 2008); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).

10 In re Sanders, 540 B.R. 911 (Bankr. S.D. Fla. 2015).

[11] Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414 (S.D. N.Y. 2008).

[12] Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414 (S.D. N.Y. 2008); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).

[13] In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).
As to pervasive bias of federal judge, see § 76.

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 76. Expressions of attitude or opinion made from the bench; pervasive bias of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(2)

A.L.R. Library

Disqualification of federal judge, under 28 USC sec. 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved, 2 A.L.R. Fed. 917

Expressions of opinion made by a judge in the exercise of his or her judicial duties cannot be made the basis of disqualification under the general disqualification statute's provision requiring disqualification for bias or prejudice[1] unless the circumstances are so extreme that the remarks reflect pervasive bias and prejudice against the party.[2] It is appropriate for judges to have opinions, even strong opinions, about the merits of arguments presented to them, as that is their job; such opinions do not show personal bias warranting recusal unless they display a clear inability to render a fair judgment.[3] Opinions formed by a judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible.[4] Expressions of impatience, dissatisfaction, and even anger will not establish the bias or prejudice required for a judge's disqualification.[5] The burden of proving "pervasive bias" from a judicial source, of the kind warranting a judge's recusal, is a demanding one, as the judge who presided at trial may, upon completion

of the evidence, be exceedingly ill disposed toward the defendant as someone who has been shown to be a thoroughly reprehensible person, but is not recusable on that basis.[6]

A trial judge should not be disqualified for comments about a case, if those comments are based upon the judge's opinion of the evidence presented in that case,[7] on the evidence heard at an earlier trial,[8] or on information learned in prior, but distinct, proceedings.[9] Similarly, a trial judge may properly comment on his or her view of a case the comments are based upon his or her study of the depositions and briefs filed in the matter.[10]

Footnotes

1 28 U.S.C.A. § 455(b)(1).

2 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).
As to requirement that bias be extrajudicial and personal, see § 75.

3 United States v. Betts-Gaston, 860 F.3d 525 (7th Cir. 2017); Teachers4Action v. Bloomberg, 552 F. Supp. 2d 414 (S.D. N.Y. 2008).

4 U.S. v. Larsen, 427 F.3d 1091 (8th Cir. 2005); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).

5 In re Damerau, 525 B.R. 799 (Bankr. S.D. Fla. 2015).
As to judge's general demeanor, see § 78.

6 In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).

7 U.S. v. Lanza-Vazquez, 799 F.3d 134 (1st Cir. 2015); Whitehurst v. Wright, 592 F.2d 834, 4 Fed. R. Evid. Serv. 617 (5th Cir. 1979).

8 Mirra v. U.S., 379 F.2d 782 (2d Cir. 1967); U.S. v. Bolden, 355 F.2d 453 (7th Cir. 1965).

9 Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968).
As to adverse judicial rulings as basis for bias, see § 79.

10 U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 77. Expressions of attitude or opinion made from the bench; pervasive bias of federal judge—Judicial remarks critical of or hostile to a party or counsel

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West's Key Number Digest

West's Key Number Digest, Judges 49(2)

A.L.R. Library

Disqualification of federal judge, under 28 USC sec. 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved, 2 A.L.R. Fed. 917

A judge has great latitude in making remarks about the parties before him or her, so long as those remarks are not founded on attitudes of extrajudicial origin.[1] In controlling the courtroom, a judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct; accordingly, remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases are usually insufficient to prove judicial bias,[2] unless the party shows such a high degree of favoritism or antagonism as to make fair judgment impossible.[3] However, a judge should be disqualified if the judge makes a comment that indicates that he or she harbors a personal animosity against a party or has prejudged a case.[4]

Thus, ordinary admonishments, whether or not legally supportable, to counsel do not establish bias sufficient to warrant the

disqualification of a judge unless they display deep-seated and unequivocal antagonism that would render a fair judgment impossible.[5] Furthermore, a judge's comments to counsel regarding trial tactics,[6] adverse rulings,[7] or counsel's previous lack of success before the appellate courts[8] do not require the judge's disqualification.

A judge's comment, at trial of a creditor's pro se nondischargeability complaint, that the creditor might have obtained a better outcome had he hired an attorney, was insufficient to show that the judge was biased against pro se litigants.[9]

Footnotes

1 In re Community Bank of Northern Virginia, 418 F.3d 277 (3d Cir. 2005); Grove Fresh Distributors, Inc. v. John Labatt, Ltd., 299 F.3d 635 (7th Cir. 2002).
As to requirement that bias be extrajudicial and personal, see § 75.

2 United States v. Berroa, 856 F.3d 141 (1st Cir. 2017); Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

3 U.S. v. Modjewski, 783 F.3d 645, 97 Fed. R. Evid. Serv. 225 (7th Cir. 2015), cert. denied, 136 S. Ct. 183, 193 L. Ed. 2d 146 (2015).
In a defendant's trial for crimes, the district judge's comments, which expressed some doubt that the defendant prepared his relatively sophisticated briefs himself, stated that the defendant's briefs were rude and impolite and "not very nice," and referred to the defendant as a "kingpin," did not justify requiring recusal of the judge. U.S. v. White, 582 F.3d 787 (7th Cir. 2009).
As to expressions of attitude or opinion made from the bench and pervasive bias, see § 76.

4 U.S. v. Womack, 454 F.2d 1337, 24 A.L.R. Fed. 276 (5th Cir. 1972).

5 Bolden v. City of Topeka, Kan., 441 F.3d 1129 (10th Cir. 2006).
A judge's remark during the course of a trial, that the judge might institute disbarment proceedings against the defense attorney, did not warrant recusal. LoCascio v. U.S., 473 F.3d 493 (2d Cir. 2007).

6 Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972).

7 U.S. v. Fricke, 261 F. 541 (S.D. N.Y. 1919).
As to adverse judicial rulings as basis for bias of federal judge, see § 79.

8 Fleischer v. A. A. P., Inc., 180 F. Supp. 717 (S.D. N.Y. 1959).

9 Brune v. Parrott, 570 B.R. 86 (E.D. Cal. 2017).

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II. Judges

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2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 78. Federal judge's general demeanor as basis for bias

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disqualification of federal judge, under 28 USC sec. 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved, 2 A.L.R. Fed. 917

While a judge's general demeanor may provide a basis for a claim of error on appeal, it generally does not provide a basis for the disqualification of the judge.[1] A judge's conduct during the proceedings should not, except in the rarest of circumstances, form the sole basis for recusal.[2] Under ordinary circumstances, allegations that a trial judge exhibited emotion,[3] anger,[4] dissatisfaction,[5] annoyance,[6] hostility,[7] irritation,[8] or stubbornness,[9] are not sufficient to cause the disqualification of the judge, except in the extreme circumstance where the judge's remarks or behavior reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.[10] Expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display, do not establish bias or partiality; the judge who has become exceedingly ill disposed towards the defendant is not thereby recusable for bias or prejudice, since her knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings.[11] Expressions of impatience concerning the resolution of longstanding and difficult

litigation fall far short of the required antagonism as to make fair judgment impossible.[12] Since it may be expected that a judge may become emotional over a motion for disqualification,[13] or if the judge reasonably believes that a party was acting with the purpose of disqualifying him or her, the judge's expression of irritation under such circumstances is not evidence of personal bias or prejudice warranting his or her disqualification,[14] although in some circumstances it may create the impression of a lack of impartiality.[15] A district judge was not required to recuse himself before sentencing a defendant on the basis that the judge had allegedly just been reversed in another case and was not in a "good mood."[16]

Observation:

A judge's ordinary efforts at courtroom administration, even a stern and short-tempered judge's ordinary efforts at courtroom administration, remain immune from requiring a judge to recuse himself based on bias.[17]

Footnotes

1 U.S. v. Anderson, 433 F.2d 856 (8th Cir. 1970).

2 U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012).

3 Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, 285 F.2d 162 (9th Cir. 1960).

4 U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012).

5 In re Damerau, 525 B.R. 799 (Bankr. S.D. Fla. 2015).

6 Andrade v. Chojnacki, 338 F.3d 448 (5th Cir. 2003).

7 Molinaro v. Watkins-Johnson CEI Division, 359 F. Supp. 474 (D. Md. 1973).

8 U.S. v. International Business Machines Corp., 475 F. Supp. 1372 (S.D. N.Y. 1979), aff'd, 618 F.2d 923 (2d Cir. 1980).

9 In re Smith, 317 F.3d 918 (9th Cir. 2002).

10 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).
As to pervasive bias of federal judge, see § 76.

11 U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012).
As to requirement that bias be extrajudicial and personal, see § 75.
As to judicial remarks critical of or hostile to a party or counsel, see § 77.

12 Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

13 Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, 285 F.2d 162 (9th Cir. 1960).

14 In re Union Leader Corp., 292 F.2d 381 (1st Cir. 1961).

15 As to effect of judicial comments in course of proceedings on whether judge's impartiality might be questioned, see § 62.

16 U.S. v. Parks, 618 Fed. Appx. 365 (10th Cir. 2015).

[17] Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 79. Adverse judicial rulings as basis for bias of federal judge

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West's Key Number Digest

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Disqualification of federal judge, under 28 USC sec. 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved, 2 A.L.R. Fed. 917

Adverse judicial rulings alone almost never constitute a valid basis for a motion for recusal on the basis of bias or partiality,[1] as judicial rulings, in and of themselves and apart from surrounding comments or accompanying opinion, (1) cannot possibly show reliance upon an extrajudicial source; (2) can only in the rarest circumstances evidence the required degree of favoritism or antagonism when no extrajudicial source is involved; and (3) almost invariably, are proper grounds for appeal, not for recusal.[2] Thus, a judge is not disqualified from hearing a case on the ground that he or she has made adverse rulings during the proceeding,[3] unless a party can show facts which indicate personal bias or prejudice.[4] In fact, the obligation not to recuse is perhaps at its highest when the motion has been brought after the party seeking recusal has sustained an adverse ruling in the course of the action.[5] Decisions or rulings must be adverse to some party, and legal disagreements with counsel are not sufficient for judicial disqualification for bias or prejudice.[6] Disqualification is not required even though the judge may have repeatedly made adverse rulings on numerous motions brought by the complaining party.[7] Neither may a judge's

statement in support of his or her rulings form a basis for disqualification,[8] even though the judge used apparently harsh language to explain some of his or her rulings,[9] so long as the judge did not manifest a closed mind regarding the merits of the case.[10] However, a trial judge's rulings may be an indicator of bias if it is established that the judge was operating under a preconceived, extrajudicial bias.[11]

Footnotes

1 Manley v. Invesco, 555 Fed. Appx. 344 (5th Cir. 2014); In re Lee, 561 B.R. 93 (B.A.P. 8th Cir. 2016); In re Allegro Law LLC, 545 B.R. 675 (Bankr. M.D. Ala. 2016).

2 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); Strange v. Islamic Republic of Iran, 46 F. Supp. 3d 78 (D.D.C. 2014); Sharkey v. J.P. Morgan Chase & Co., 2017 WL 1386350 (S.D. N.Y. 2017).

3 Berger v. U.S., 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 17 Fed. R. Evid. Serv. 928, 1 Fed. R. Serv. 3d 1602 (8th Cir. 1985).

4 Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379 (1913).

5 U.S. v. Sierra Pacific Industries, 759 F. Supp. 2d 1198 (E.D. Cal. 2010).

6 Jordan v. Verizon Corp., 391 Fed. Appx. 10 (2d Cir. 2010); City of Riviera Beach v. Lozman, 672 Fed. Appx. 892 (11th Cir. 2016).

7 LoCascio v. U.S., 473 F.3d 493 (2d Cir. 2007).

8 U.S. v. 16,000 Acres of Land, More or Less, in LaBette County, Kan., 49 F. Supp. 645 (D. Kan. 1942); Mirra v. U.S., 255 F. Supp. 570 (S.D. N.Y. 1966), order aff'd, 379 F.2d 782 (2d Cir. 1967).

9 U.S. v. Lattimore, 125 F. Supp. 295 (D. D.C. 1954).

10 U.S. v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); In re Wilborn, 401 B.R. 848, 49 A.L.R.6th 669 (Bankr. S.D. Tex. 2009).
As to expressions of attitude or opinion made from the bench, see § 76.

11 Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978).
As to requirement that bias be extrajudicial and personal, see § 75.

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(1) General Considerations

§ 80. Federal judge's bias toward or against attorney

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West's Key Number Digest

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Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575

The term "party" as used in the statute providing for disqualification of district court judges for bias or prejudice[1] does not include counsel as such.[2] Thus, recusal based upon actual bias or prejudice requires a showing of bias or partiality as to a party, not as to counsel.[3] A charge that the judge is biased against the litigant's counsel cannot form a basis for disqualification, unless the bias can be said to constitute bias to the party.[4] A judge cannot be disqualified, even if he or she displays irritation at an attorney[5] or vehemently disagrees with the legal advice the attorney gave his or her client.[6] The rule that bias against an attorney does not result in the disqualification of the judge also assures that a lawyer who is engaged in a running feud with a judge cannot automatically obtain his or her disqualification and the reassignment of cases at will.[7]

Although, generally speaking, a judge cannot be disqualified for bias against an attorney, this rule is not universal, and a judge may be disqualified when bias in favor or against an attorney results in bias against a party.[8] For this to happen, the bias must be of a continuing and personal nature and not simply bias against the attorney or in favor of another attorney because

of his or her conduct.[9] In addition, extremely virulent personal bias or prejudice against an attorney can amount to a bias against the attorney's party.[10]

A judge is not disqualified by the fact that he or she may be friendly with opposing counsel.[11]

Practice Tip:

Where a judge recuses him or herself in several cases involving a party's counsel, because of the judge's feeling that he or she might be biased against the attorney due to the attorney's unprofessional conduct, the judge is not obligated to recuse him or herself in all subsequent cases involving the same attorney.[12]

Footnotes

1 28 U.S.C.A. § 144.

2 In re Cooper, 821 F.2d 833 (1st Cir. 1987).

3 In re Sanders, 540 B.R. 911 (Bankr. S.D. Fla. 2015).

4 Henderson v. Department of Public Safety and Corrections, 901 F.2d 1288, 16 Fed. R. Serv. 3d 1182 (5th Cir. 1990).

5 Rosen v. Sugarman, 357 F.2d 794 (2d Cir. 1966).

6 U.S. v. Conforte, 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, 624 F.2d 869 (9th Cir. 1980).
As to a judge's comments regarding counsel, see § 77.

7 Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 21 Fed. R. Serv. 2d 763 (5th Cir. 1975).

8 Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 21 Fed. R. Serv. 2d 763 (5th Cir. 1975); U.S. v. Ritter, 540 F.2d 459 (10th Cir. 1976).

9 Henderson v. Department of Public Safety and Corrections, 901 F.2d 1288, 16 Fed. R. Serv. 3d 1182 (5th Cir. 1990).

10 U.S. v. Jacobs, 855 F.2d 652 (9th Cir. 1988); U.S. v. Burt, 765 F.2d 1364 (9th Cir. 1985).

11 Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98 (5th Cir. 1975).

12 Diversified Numismatics, Inc. v. City of Orlando, FL., 949 F.2d 382 (11th Cir. 1991) (noting that "[t]empers do cool, and anger does dissipate").

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32 Am. Jur. 2d Federal Courts § 81

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 81. Conducting ex parte or off-the-record conferences as basis for bias of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567

Ex parte contact does not, in itself, evidence any kind of judicial bias.[1] The mere occurrence of an ex parte conference is insufficient to require a judge's disqualification.[2] Allegations that a plaintiff against whom a judgment for want of prosecution was entered had a meeting with the judge without notifying the defendants or their attorneys, and as a result of such meeting, the dismissal was vacated, may not support a charge of bias requiring the judge's disqualification, since dismissals for lack of prosecution are not favored by the courts and the vacation of the dismissal was well within the court's discretion.[3]

A district court judge was not required to recuse herself from determining the compensation of a special master, where the issue under consideration was the special master's work under the auspices of the court, the judge received information ex parte in order to preserve the integrity of the judicial process, and the judge provided the special master with ample due

process.[4] A Judicial Council judge's determination in a judicial misconduct proceeding, that the district judge had improperly entered orders in a bankruptcy case based on ex parte contacts with the debtor, did not constitute "recusable bias" in a subsequent judicial misconduct proceeding concerning the district judge's alleged disingenuous and misleading responses to the prior complaint, and no evidence was presented of actual bias or an appearance of bias.[5]

Footnotes

1 In re Mitan, 579 Fed. Appx. 67 (3d Cir. 2014); Getsy v. Mitchell, 495 F.3d 295, 2007 FED App. 0281P (6th Cir. 2007); U.S. v. Siegelman, 799 F. Supp. 2d 1246 (M.D. Ala. 2011).

2 U.S. v. Yonkers Bd. of Educ., 946 F.2d 180 (2d Cir. 1991); Willenbring v. U.S., 306 F.2d 944 (9th Cir. 1962).
The United States Marshals' decision to investigate an inappropriate, ex parte letter the plaintiff sent to the presiding judge was pursuant to the Marshals' standard operating procedure, and thus did not indicate bias or prejudice toward the plaintiff on the part of the judge. Casterline v. Indy Mac/One West, 761 F. Supp. 2d 483 (S.D. Tex. 2011).
As to effect of ex parte contacts or consideration of evidence on whether judge's impartiality might be questioned, see § 64.

3 Martelli v. City of Sonoma, 359 F. Supp. 397, 23 A.L.R. Fed. 626 (N.D. Cal. 1973).

4 Cordoza v. Pacific States Steel Corp., 320 F.3d 989, 54 Fed. R. Serv. 3d 1076 (9th Cir. 2003).

5 In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 563 (U.S. Jud. Conf. 2008).

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32 Am. Jur. 2d Federal Courts § 82

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(1) General Considerations

§ 82. Sentencing as basis for bias of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Pretrial comments indicating fixed view as to proper punishment for particular type of crime as basis for judge's disqualifiation under 28 U.S.C.A. sec. 144, 29 A.L.R. Fed. 588

Sentencing is a judicial act which generally cannot give rise to a claim of prejudice or bias.[1] The severity of a sentence is not in and of itself sufficient to demonstrate bias on the part of the judge,[2] and the fact that a criminal defendant is denied bail[3] or receives the maximum penalty does not indicate bias or prejudice.[4] Thus, allegations that the sentence in the particular case was unduly harsh,[5] or that a judge imposed maximum and consecutive sentences in order to make a point,[6] are insufficient to establish prejudice on the part of the judge. Moreover, there is no presumption of vindictiveness on the part of the trial court by reason of the fact that two prior sentences imposed by the trial court have been reversed on technical grounds, and such reversals provide no basis for transferring the case to another court for resentencing.[7] However, if a judge has prejudged a class of cases, and has decided, for instance, that in order to pressure conscientious objectors into submitting to induction, he or she would enforce a uniform policy of imposing 30-month sentences, the judge is disqualified from hearing draft cases, since such a policy reflects the judge's prejudice concerning defendants in Selective Service cases generally, and does not

take a particular defendant's actions into consideration.[8]

It does not constitute bias or prejudice for the judge, in the process of sentencing, to express his or her appraisal of the conduct of the defendant in emphatic language in order to impress upon the defendant the error of his or her ways.[9] A remark of the sentencing judge expressing concern for the defendants' lack of remorse for their conduct and declared intention to continue illegal activities once released, being directed toward the defendant's chances for a successful rehabilitation, is a proper concern of the trial court and does not demonstrate bias.[10]

The fact that knowledge of a criminal defendant was gained in separate courtroom proceedings presided over by the same judicial officer does not alter the judicial character of the knowledge, and sentencing comments in a subsequent case based on such knowledge cannot provide grounds for disqualification of the sentencing judge.[11] Furthermore, a judge's ex parte viewing of evidence for sentencing does not require disqualification where the judge had seen the same evidence previously in open court, considerable time elapsed between the viewing of the evidence in question and the sentencing, and there is no inference of any prejudicial ex parte conversation.[12]

A letter from a sentencing judge to the Federal Bureau of Prisons recommending against parole for the defendants after their term of imprisonment reflects a conclusion from facts presented at trial together with the judge's observation of the defendants, and does not constitute bias.[13]

Footnotes

1 U.S. v. Richards, 314 Fed. Appx. 522 (4th Cir. 2008); U.S. v. Nehas, 368 F. Supp. 435 (W.D. Pa. 1973).

2 U.S. v. Walker, 920 F.2d 513 (8th Cir. 1990).

3 U.S. v. Cruzado-Laureano, 527 F.3d 231 (1st Cir. 2008).

4 U.S. v. Story, 716 F.2d 1088 (6th Cir. 1983); U.S. v. Dumonde, 509 Fed. Appx. 859 (11th Cir. 2013).

5 Wapnick v. U.S., 311 F. Supp. 183 (E.D. N.Y. 1969), judgment aff'd, 423 F.2d 1361 (2d Cir. 1970).

6 U.S. v. Conforte, 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, 624 F.2d 869 (9th Cir. 1980).

7 U.S. v. Schoenhoff, 919 F.2d 936 (5th Cir. 1990).

8 U.S. v. Thompson, 483 F.2d 527, 29 A.L.R. Fed. 581 (3d Cir. 1973); U.S. v. Townsend, 478 F.2d 1072 (3d Cir. 1973).

9 Simmons v. U.S., 302 F.2d 71 (3d Cir. 1962); U.S. v. Dumonde, 509 Fed. Appx. 859 (11th Cir. 2013).

10 U.S. v. Rosenberg, 806 F.2d 1169 (3d Cir. 1986).
The sentencing judge's affirmative finding of the defendant's pedophilic identification did not mandate recusal for bias, as the judge's opinion was not a "fact" and the court acknowledged as much by defining the court's own classification as her "opinion" on the matter. U.S. v. Modjewski, 783 F.3d 645, 97 Fed. R. Evid. Serv. 225 (7th Cir. 2015), cert. denied, 136 S. Ct. 183, 193 L. Ed. 2d 146 (2015).

11 U.S. v. Troxell, 887 F.2d 830 (7th Cir. 1989).

12 U.S. v. Walker, 920 F.2d 513 (8th Cir. 1990).

13 U.S. v. Rosenberg, 806 F.2d 1169 (3d Cir. 1986) (decided under 28 U.S.C.A. § 144).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(2) Judge's Actions in Prior or Related Cases

§ 83. Prior proceedings in same case; judge's ability to preside over retrial

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disqualification of original trial judge to sit on retrial after reversal or mistrial; federal cases, 22 A.L.R. Fed. 709

A judge is not disqualified from presiding over a particular proceeding by the fact that the judge was exposed to the parties or issues involved in the present case when he or she presided over a prior proceeding.[1] Accordingly, a federal judge who presided at a former trial is not disqualified to sit on the retrial of the case after a reversal or mistrial, simply because he or she presided over the original trial.[2]

Observation:

The courts of appeals do have the inherent power in the administration of appeals and remands to reassign a case in the event of retrial or remand. This authority to reassign exists apart from the judicial disqualification statutes, and reassignment is permissible

to preserve the appearance of justice. However, absent proof of personal bias, the appellate court will remand to a new judge only under extreme circumstances.[3]

While a judge is not disqualified from presiding over a retrial because he or she formed opinions based on the evidence presented at the first trial, a judge is disqualified from presiding over a second trial if he or she has formed an opinion based on extrajudicial information and will not follow the mandate of the court of appeals.[4] Even an opinion which is not based on extrajudicial information may be the basis for disqualification on remand if it is so extreme as to display the judge's clear inability to render a fair judgment.[5] A judge is also disqualified from presiding over a retrial if he or she makes prejudicial remarks about the defendant's success on appeal.[6]

Practice Tip:

Recusal from only a portion of the proceedings on remand is not permitted.[7]

Footnotes

1 U.S. v. Winston, 613 F.2d 221 (9th Cir. 1980); Poole v. U.S., 2009 WL 2392927 (N.D. Ohio 2009).
As to adverse judicial rulings as basis for bias of federal judge, see § 79.

2 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); Smith v. State of N. C., 528 F.2d 807 (4th Cir. 1975).

3 O'Rourke v. City of Norman, 875 F.2d 1465 (10th Cir. 1989).
As to reassignment, see § 57.

4 Peacock Records, Inc. v. Checker Records, Inc., 430 F.2d 85 (7th Cir. 1970).

5 Liteky v. U.S., 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).
A judge's prejudice or bias, as would require disqualification from the proceeding, may stem from either personal or extrajudicial sources, or arise during the course of current or prior proceedings. Burley v. Gagacki, 834 F.3d 606 (6th Cir. 2016).

6 U.S. v. Holland, 655 F.2d 44 (5th Cir. 1981).

7 U.S. v. Feldman, 983 F.2d 144 (9th Cir. 1992).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(2) Judge's Actions in Prior or Related Cases

§ 84. Other litigation involving same movant as basis for bias of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651

Disqualification of federal judge, under 28 USC sec. 144, for acts and conduct occurring in courtroom during trial or in ruling upon issues or questions involved, 2 A.L.R. Fed. 917

Forms

Forms relating to judge as former prosecutor, see Federal Procedural Forms, Criminal Procedure [Westlaw® Search Query]

A federal judge is not disqualified from hearing a matter, even though he or she decided a previous, distinct case in a manner adverse to the complaining party.[1] It makes no difference that both cases were civil[2] or criminal,[3] or that one case was civil and the other was criminal.[4] A judge is not required to recuse him or herself from a defendant's prosecution based on statements made in a prior proceeding against the defendant, where there is no evidence that the district judge is unable to adjudicate the defendant's current case fairly due to opinions formed and expressed earlier.[5] Thus, the judge's disqualification is not mandated even though the judge displayed a hostile attitude,[6] attacked the defendant's credibility,[7] said that the petitioner would continue committing crimes,[8] said that one witness had lied,[9] made adverse rulings,[10] or committed errors[11] at the previous trial. Nor is a judge required to recuse him or herself under the general disqualification statute[12] merely because the judge did so in an earlier case in which the defendant in the instant case was also the defendant.[13]

A judge hearing a collateral motion to vacate a conviction need not disqualify him or herself based on an allegation that he or she may be prejudiced because the judge presided at the original trial[14] and may have made rulings adverse to the petitioner[15] or allegedly harassed the petitioner while he or she was on the stand during his or her criminal trial.[16] A prisoner's filing of a complaint of judicial misconduct against the trial judge concerning the judge's handling of the prisoner's habeas action was not a sufficient basis to require recusal of the judge in the prisoner's Section 1983 action.[17] However, the disqualification of a federal district judge hearing a habeas corpus case may be justified on the ground that the judge's impartiality might reasonably be questioned if the judge participated in the state court's adjudication of the same claim.[18]

Footnotes

1 U.S. v. Liteky, 973 F.2d 910 (11th Cir. 1992), judgment aff'd, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); Fowlkes v. Parker, 2009 WL 249810 (N.D. N.Y. 2009); Rivera-Perez v. U.S., 508 F. Supp. 2d 150 (D.P.R. 2007).
A judge's prior decision in a related case, denying a motion to suppress telephone recordings, was not evidence of any unwarranted bias or prejudice in the judge's subsequent denial of another defendant's motion to suppress those same recordings. U.S. v. McTiernan, 695 F.3d 882 (9th Cir. 2012).

2 Barnes v. U.S., 241 F.2d 252 (9th Cir. 1956).

3 U.S. v. Roberts, 463 F.2d 372 (4th Cir. 1972).

4 In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980).

5 U.S. v. Larsen, 427 F.3d 1091 (8th Cir. 2005).

6 Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968).

7 U.S. v. Boffa, 513 F. Supp. 505 (D. Del. 1981).

8 Griffin v. McNeil, 667 F. Supp. 2d 1340 (S.D. Fla. 2009).

9 U.S. v. Daley, 564 F.2d 645 (2d Cir. 1977).

10 McNally v. American States Ins. Co., 382 F.2d 748 (6th Cir. 1967).

11 Wolfson v. Palmieri, 396 F.2d 121 (2d Cir. 1968).

12 28 U.S.C.A. § 455.

13 U.S. v. Merkt, 794 F.2d 950, 21 Fed. R. Evid. Serv. 256 (5th Cir. 1986).

14 Walters v. U.S., 404 F. Supp. 996 (S.D. N.Y. 1975), aff'd, 542 F.2d 1166 (2d Cir. 1976).

15 Mirra v. U.S., 255 F. Supp. 570 (S.D. N.Y. 1966), order aff'd, 379 F.2d 782 (2d Cir. 1967).

16 Boyance v. U.S., 275 F. Supp. 772 (E.D. Pa. 1967).
As to adverse judicial rulings as basis for bias of federal judge, see § 79.

17 Garrett v. Gersovitz, 2009 WL 508952 (D. Mont. 2009), report and recommendation adopted, 2009 WL 528303 (D. Mont. 2009).
As to impartiality of federal judge after activity in other cases or proceedings, see § 65.

18 As to effect of federal judge's former employment on impartiality, see § 70.

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(2) Judge's Actions in Prior or Related Cases

§ 85. Similar or related cases involving other parties as basis for bias of federal judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 49(1)

A.L.R. Library

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651

An allegation that a judge is not impartial because he or she ruled in an adverse manner in similar cases is insufficient to require the judge's disqualification.[1] The fact that a district court judge presiding over a habeas proceeding had not granted habeas petitions in the past five years does not provide a basis for her recusal, as it does nothing to show that the judge is biased in this case.[2]

A judge is not disqualified for presiding over a criminal trial by the fact that he or she also presided over the trials of other parties involved in the same crime or conspiracy.[3] A judge need not disqualify him or herself from hearing a case because the judge disqualified him or herself in cases involving other defendants arising out of the same incident; the mere fact that a judge may have felt some prejudice against the other defendants does not necessarily indicate that he or she is personally biased against the present defendant.[4]

Footnotes

1 Beland v. U. S., 117 F.2d 958 (C.C.A. 5th Cir. 1941).
As to adverse judicial rulings as basis for bias of federal judge, see § 79.

2 Kostich v. McCollum, 647 Fed. Appx. 887 (10th Cir. 2016).

3 U.S. v. Schreiber, 599 F.2d 534 (3d Cir. 1979).

4 U.S. v. Dodge, 538 F.2d 770 (8th Cir. 1976).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(3) Judge's Background or Associations

§ 86. Federal judge's background or experiences as basis for bias; ethnic, racial, or political prejudice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 46, 49(1), 49(2)

Forms

Forms relating to judge bias for ethnic, racial, or political reasons, see Federal Procedural Forms, Criminal Procedure [Westlaw® Search Query]

Generally, a judge's opinions that grow out of his or her background or experiences do not constitute prejudice within the meaning of the disqualification statutes.[1] A judge is not precluded from hearing civil rights cases because he or she holds the belief, based on background and experience, that the rights of others must be zealously protected.[2]

However, prejudice against a class, as opposed to a particular litigant, can form the basis for recusal, as can a clearly evinced policy of disregarding the merits in any class of cases.[3] A judge is disqualified from hearing a case if he or she is prejudiced against a defendant because of his or her national origin.[4] However, a judge's alleged bias against a racial or other class of persons will not justify recusal unless the complaining party is a member of the class in question.[5] A general statement by a judge that he or she does not like the people or courts of a particular country will not lead to the judge's disqualification if no

extrajudicial bias against a particular defendant is shown.[6] An African-American judge's dismissal of earlier cases by a prisoner who espoused "Aryan beliefs" did not establish the judge's bias.[7]

A judge may be disqualified to sit if he or she holds a racial prejudice against a party, and racial prejudice might be shown, even though a judge does not admit a prejudice per se, if a judge is prejudiced against a party's attorney because that attorney handles civil rights cases.[8] However, judges interested in the vigorous enforcement of the civil rights laws have not disqualified themselves despite allegations that their actions unduly favored black persons at the expense of poor whites.[9]

Footnotes

1 Hurd v. Letts, 152 F.2d 121 (App. D.C. 1945); Blank v. Sullivan and Cromwell, 418 F. Supp. 1 (S.D. N.Y. 1975).

2 Com. of Pa. v. Local Union 542, Intern. Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974).
As to effect of federal judge's beliefs on whether judge's impartiality might be questioned, see § 66.

3 Phillips v. Joint Legislative Committee on Performance and Expenditure Review of State of Miss., 637 F.2d 1014, 31 Fed. R. Serv. 2d 67 (5th Cir. 1981).

4 Berger v. U.S., 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921).

5 Diversified Numismatics, Inc. v. City of Orlando, FL., 949 F.2d 382 (11th Cir. 1991); United States v. Lynch, 227 F. Supp. 3d 421 (W.D. Pa. 2017); U.S. v. Ettinger, 36 M.J. 1171 (N.M.C.M.R. 1993).

6 Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497 (D.S.C. 1975).

7 Hoeft v. Dommisse, 352 Fed. Appx. 77 (7th Cir. 2009).

8 Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 21 Fed. R. Serv. 2d 763 (5th Cir. 1975).

9 Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

b. Personal Bias or Prejudice

(3) Judge's Background or Associations

§ 87. Federal judge's social, political, or professional affiliations as basis for bias

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 46, 49(1)

A.L.R. Library

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923

Judge's membership in bar association as ground for disqualification under 28 U.S.C.A. sec. 455, 42 A.L.R. Fed. 331

Forms

Forms relating to judge bias for ethnic, racial, or political reasons, see Federal Procedural Forms, Criminal Procedure [Westlaw® Search Query]

A judge's acquaintance with a party, an attorney, or a witness, without some factual allegation of bias or prejudice, is not sufficient to warrant recusal.[1] An allegation that a judge's friendships may render him or her biased in a particular case is insufficient to require the judge's disqualification.[2] Thus, disqualification is not required even though it is alleged that the judge may have to judge the credibility of friends who are witnesses or parties in a case,[3] or may believe that a friend could not be guilty.[4]

A judge need not be disqualified from hearing a challenge to military regulations because he or she was formerly an officer in the Navy.[5] A judge was not required to recuse himself from a former university student's action against the university based on the fact that the judge received two degrees from the university 60 years ago and had formerly taught there as adjunct faculty.[6] While a judge is not disqualified, per se, from hearing a case involving a litigant who is active in politics, even though the judge had been an active participant in the opposing political party prior to assuming the bench, a judge may be disqualified from hearing such a case if he or she had a close, personal relationship with officeholders whose political interests were in conflict with the litigant's and if the litigant had openly opposed the judge's confirmation to the bench.[7]

Footnotes

1 Smith v. Bender, 350 Fed. Appx. 190 (10th Cir. 2009); Dembowski v. New Jersey Transit Rail Operations, Inc., 221 F. Supp. 2d 504 (D.N.J. 2002); Kapsis v. Bloom, 2009 WL 275445 (E.D. N.Y. 2009).
As to effect of federal judge's personal and professional relationships, acquaintanceships, or activities on whether judge's impartiality might be questioned, see § 68.

2 Lyman v. City of Albany, 597 F. Supp. 2d 301 (N.D. N.Y. 2009); Firnhaber v. Sensenbrenner, 385 F. Supp. 406 (E.D. Wis. 1974).

3 Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98 (5th Cir. 1975).

4 Harley v. Oliver, 400 F. Supp. 105 (W.D. Ark. 1975).

5 Deal v. Warner, 369 F. Supp. 174 (W.D. Mo. 1973).

6 Muhammad v. Moore, 611 Fed. Appx. 352 (7th Cir. 2015).
As to effect of federal judge's political or religious associations, activities, or affiliations on whether judge's impartiality might be questioned, see § 67.

7 U.S. v. Bravo Fernandez, 792 F. Supp. 2d 178 (D.P.R. 2011); U.S. v. Moore, 405 F. Supp. 771 (S.D. W. Va. 1976).
A judge's alleged association with the Democratic Party and appointment to the federal bench by a Democratic president did not demonstrate actual bias warranting the judge's disqualification in a former chairman's action against a government watchdog organization for breach of a severance agreement, even though the chairman had filed numerous lawsuits against the president's administration and had a self-described reputation of being "anti-Democratic," where the president was not a party to the litigation. Klayman v. Judicial Watch, Inc., 744 F. Supp. 2d 264 (D.D.C. 2010).

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32 Am. Jur. 2d Federal Courts § 88

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

c. Prior Practice or Employment; Judge as Material Witness

§ 88. Federal judge or former law firm represented private party as basis for disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 46, 47(1), 47(2), 49(1)

A.L.R. Library

Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case, 85 A.L.R.5th 471

Disqualification of a judge is required if, in private practice, the judge served as a lawyer in the matter in controversy, or if a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter in controversy.[1] If applicable, this statutory provision regarding disqualification of judges due to work at a law firm regarding the matter in controversy mandates recusal, and cannot be waived by the parties.[2] However, recusal is not necessary when the judge's earlier representation, which did not touch upon the merits of the present case, did not involve the same "matter in controversy."[3] While one court has held that the term "matter in controversy" should be given a restrictive reading,[4] other courts find the phrase is intended to have broader meaning than the specific case pending for resolution.[5] The question of recusal under this provision is necessarily a fact-intensive inquiry.[6]

The provisions regarding a judge's former law associates are consistent with the general rule that the employment of a law firm is the equivalent of a retainer of each of the partners, and that the retainer of one member of the law firm is considered to be the employment of the entire firm.[7] For purposes of this provision, in a criminal case the matter in controversy consists not

only of the charges brought by the government but also any defense asserted by the accused as to which the judge or a former partner may testify.[8]

Practice Tip:

The general rule that a motion for recusal must be made with reasonable promptness after the ground for the motion is ascertained[9] applies to recusal motions based on prior representation of a party by the judge's former law firm. Where a party seeking recusal on this ground fails to do so until after an adverse decision has been rendered on the merits, the motion is untimely.[10]

A judge is not disqualified by his or her former law firm's representation before the judge of an institutional client which it also represented when the judge was a member of the law firm, where the law firm's membership and the client's personnel have changed over the several years since the judge left the firm, although such a connection may lead the judge to recuse him or herself on his or her own motion.[11] The provision dealing with the representation of parties[12] also does not require recusal where the judge or a lawyer with whom the judge practiced represented a party in a suit in state court to perpetuate testimony involving the same matter in controversy now pending before the judge, and the fact that the two suits might have some facts in common is not controlling.[13]

Where a judge denies consolidation of a related case which might have provided a basis for recusal, the "matter in controversy" in the instant case cannot be the same.[14]

Footnotes

1 28 U.S.C.A. § 455(b)(2).
Recusal of a federal district court judge from further prosecution in a conspiracy prosecution was appropriate; although the judge did not have any involvement in the prior matter, other members of the same firm performed work on that case, which constituted a "matter in dispute" in the instant criminal proceeding. U.S. v. Lawson, 2009 WL 1702073 (E.D. Ky. 2009).
As to effect of federal judge's former employment on impartiality, see § 70.

2 Philip Morris USA Inc. v. United States Food and Drug Administration, 156 F. Supp. 3d 36 (D.D.C. 2016).

3 Little Rock School Dist. v. Armstrong, 359 F.3d 957, 185 Ed. Law Rep. 437 (8th Cir. 2004); U.S. v. Black, 490 F. Supp. 2d 630 (E.D. N.C. 2007); E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 847 F. Supp. 2d 843 (E.D. Va. 2012); In re Byers, 509 B.R. 577 (Bankr. S.D. Ohio 2014).

4 Blue Cross & Blue Shield of Rhode Island v. Delta Dental of Rhode Island, 248 F. Supp. 2d 39 (D.R.I. 2003).

5 U.S. v. Lawson, 2009 WL 1702073 (E.D. Ky. 2009).

6 Philip Morris USA Inc. v. United States Food and Drug Administration, 156 F. Supp. 3d 36 (D.D.C. 2016).

7 SCA Services, Inc. v. Morgan, 557 F.2d 110, 40 A.L.R. Fed. 942 (7th Cir. 1977).

8 In re Rodgers, 537 F.2d 1196 (4th Cir. 1976).

9 As to timeliness of motion to disqualify or recuse federal judge, see § 49.

10 E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992).

11 School Dist. of Kansas City, Missouri v. State of Mo., 438 F. Supp. 830 (W.D. Mo. 1977).

12 28 U.S.C.A. § 455(b)(2).

13 Dixie Carriers, Inc. v. Channel Fueling Service, Inc., 669 F. Supp. 150 (E.D. Tex. 1987) (judge recused himself so as to avoid appearance of impropriety).

14 In re Little Rock School Dist., 833 F.2d 112, 42 Ed. Law Rep. 1080 (8th Cir. 1987), opinion supplemented, 839 F.2d 1296, 44 Ed. Law Rep. 1081 (8th Cir. 1988).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

c. Prior Practice or Employment; Judge as Material Witness

§ 89. Federal judge's former employment by government as basis for disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 46, 47(1), 47(2), 49(1)

A.L.R. Library

Prior Representation or Activity as Prosecuting Attorney as Disqualifying Judge from Sitting or Acting in Criminal Case, 85 A.L.R.5th 471

Disqualification of Federal Judge Under 28 U.S.C.A. s455(b)(3), Providing for Disqualification of Judges Who Formerly Served in Government, 34 A.L.R. Fed. 2d 589

Forms

Forms relating to judge as former prosecutor, see Federal Procedural Forms, Criminal Procedure [Westlaw® Search Query]

A judge is disqualified from presiding over a case if he or she has previously served in government employment and, in such

capacity, has participated as counsel, adviser, or a material witness concerning the proceeding[1] or expressed an opinion concerning the merits of the particular case in controversy.[2] Recusal of a judge is required based on his personal participation in a case as counsel, adviser, or material witness, or based on his prior expressed opinion on the merits of the case.[3] A judge or magistrate is disqualified from hearing a case if he or she previously has been of counsel for the government in earlier proceedings in the instant case.[4]

A judge is not disqualified to sit because the judge commented on certain issues of law when he or she was a government employee, so long as the judge has not prejudged the particular case before him or her.[5] A judge is not subject to mandatory disqualification based on the mere fact that another lawyer in his or her prior government office served as an attorney on the matter.[6] Also, a judge's past association with the military, such as with the judge advocate general, does not automatically disqualify a judge from ruling on matters involving the armed services.[7]

The statute does not disqualify a judge who is a former United States Attorney for having been "of counsel" in the instant proceeding, as disqualification is restricted to those cases in which the judge has taken a part,[8] that is, in the investigation, preparation, or prosecution of a case.[9] A party seeking recusal must show that a judge, while serving as United States Attorney, actually participated as counsel for the government in investigating or prosecuting the specific conspiracy underlying the present indictment.[10] Even a judge who formerly occupied a supervisory position in the United States Attorney's Office during the prosecution is not later required to recuse herself as a judge presiding over the prosecution solely on that basis, without some showing that she actually participated in the prosecution prior to becoming a judge.[11]

Observation:

A district judge who served in the Executive Branch is not disqualified from presiding over a proceeding under the judicial disqualification statute absent an actual conflict of interest.[12]

Footnotes

1 U.S. v. Lara-Unzueta, 735 F.3d 954 (7th Cir. 2013).

2 28 U.S.C.A. § 455(b)(3).
As to effect of federal judge's former employment on impartiality, see § 70.

3 Nicholson v. City of Peoria, Illinois, 860 F.3d 520 (7th Cir. 2017); U.S. v. French, 380 Fed. Appx. 602 (9th Cir. 2010); Rahman v. Johanns, 501 F. Supp. 2d 8 (D.D.C. 2007); Firnhaber v. Sensenbrenner, 385 F. Supp. 406 (E.D. Wis. 1974).

4 Mixon v. U.S., 620 F.2d 486 (5th Cir. 1980).

5 Laird v. Tatum, 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972); Barry v. U.S., 528 F.2d 1094 (7th Cir. 1976).

6 U.S. v. Champlin, 388 F. Supp. 2d 1177 (D. Haw. 2005).

7 Complaint of Judicial Misconduct, 8 Cl. Ct. 523 (1985).

8 U.S. v. Di Pasquale, 864 F.2d 271, 110 A.L.R. Fed. 669 (3d Cir. 1988).

9 U.S. v. Gipson, 835 F.2d 1323 (10th Cir. 1988) (any participation "however small").

[10] United States v. Norwood, 854 F.3d 469 (8th Cir. 2017).
That the sentencing court judge worked as the United States Attorney during the FBI's investigation into the defendant's child pornography offenses did not mandate the judge's recusal from the case; the United States Attorney's Office and FBI were organizationally distinct, and there was no basis in the relationship between the two to warrant viewing the United States Attorney as "counsel, adviser or material witness" under the statute governing conflicts mandating recusal. U.S. v. Miller, 221 Fed. Appx. 182 (4th Cir. 2007).

[11] United States v. Dorsey, 829 F.3d 831 (7th Cir. 2016).

[12] U.S. v. Lara-Unzueta, 735 F.3d 954 (7th Cir. 2013); Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, 34 A.L.R. Fed. 2d 813 (D.C. Cir. 2006).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

c. Prior Practice or Employment; Judge as Material Witness

§ 90. Federal judge's knowledge of evidentiary facts as basis for disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 49(1)

A judge must disqualify him or herself.[1] if the judge has personal knowledge of disputed evidentiary facts concerning the proceeding.[2] Accordingly, a federal judge properly disqualifies him or herself from hearing a case if the possibility exists that he or she learned evidentiary facts relating to the case while he or she was representing one of the parties involved in the case.[3] However, knowledge of disputed facts requires disqualification only if the knowledge has an extrajudicial source.[4]

Furthermore, disqualification is required only for knowledge of matters underlying the cause of action, and not knowledge of matters relating to credibility.[5] Thus, an allegation that a judge may be more disposed to believe in the credibility of one side's witnesses over others does not establish that the judge has personal knowledge of disputed evidentiary facts within the meaning of the statute.[6]

Footnotes

1 28 U.S.C.A. § 455(b)(1).

2 Rupert v. Ford Motor Company, 640 Fed. Appx. 205 (3d Cir. 2016); U.S. v. Modjewski, 783 F.3d 645, 97 Fed. R. Evid. Serv. 225 (7th Cir. 2015), cert. denied, 136 S. Ct. 183, 193 L. Ed. 2d 146 (2015); Baker & Hostetler LLP v. U.S. Dept. of Commerce, 471 F.3d 1355, 34 A.L.R. Fed. 2d 813 (D.C. Cir. 2006).

[3] U.S. v. Black, 490 F. Supp. 2d 630 (E.D. N.C. 2007); W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp., 467 F. Supp. 801 (D.P.R. 1979).

[4] U.S. v. Carlton, 534 F.3d 97 (2d Cir. 2008); U.S. v. Widgery, 778 F.2d 325 (7th Cir. 1985); Arrowood Indem. Co. v. City of Warren, Mich., 54 F. Supp. 3d 723 (E.D. Mich. 2014).

[5] Plechner v. Widener College, Inc., 569 F.2d 1250, 24 Fed. R. Serv. 2d 921, 42 A.L.R. Fed. 313 (3d Cir. 1977).

[6] Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98 (5th Cir. 1975).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

c. Prior Practice or Employment; Judge as Material Witness

§ 91. Federal judge as material witness in proceeding as basis for disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 45, 49(1)

A.L.R. Library

Disqualification of judge on ground of being a witness in the case, 22 A.L.R.3d 1198

Disqualification of a judge is required where the judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the matter in controversy,[1] and under this provision recusal is automatic.[2] The purpose of this rule is to assure that a judge does not have to pass on the competency and veracity of his or her own testimony given in the matter in controversy.[3] Thus, disqualification is not required where a party wants a judge to testify about matters happening at trial.[4] In this regard, it should also be noted that Rule 605 of the Federal Rules of Evidence provides that a judge presiding at a trial may not testify in that trial as a witness, thereby prohibiting a party from forcing a judge's disqualification by subpoenaing him or her as a witness to testify as to matters occurring at trial.[5]

A judge must also disqualify him or herself if the judge is, to the judge's knowledge, likely to be a material witness in the proceeding.[6] Recusal of a judge who is "likely to be a material witness in the proceeding" is mandatory.[7] However, an assertion that the judge will be a material witness does not lead automatically to the judge's disqualification,[8] and unsubstantiated speculation about the possibility that the judge will be required to be a material witness concerning a disputed issue is not enough to require recusal.[9] Recusal is only required where particularized facts demonstrate that the judge will

likely testify as a material witness.[10] Also, a judge is not required to recuse when there are other available witnesses that could provide the same testimony as that judge.[11]

Footnotes

1 28 U.S.C.A. § 455(b)(2).

2 Blue Cross & Blue Shield of Rhode Island v. Delta Dental of Rhode Island, 248 F. Supp. 2d 39 (D.R.I. 2003).

3 In re Continental Vending Mach. Corp., 543 F.2d 986 (2d Cir. 1976).

4 U.S. v. Alberico, 453 F. Supp. 178 (D. Colo. 1977).

5 U.S. v. Alberico, 453 F. Supp. 178 (D. Colo. 1977).
As to Federal Rules of Evidence 605, generally, see Am. Jur. 2d, Witnesses § 265.

6 28 U.S.C.A. § 455(b)(5)(iv).

7 In re O'Farrell, 498 B.R. 873 (Bankr. S.D. Ind. 2013).

8 In re O'Farrell, 498 B.R. 873 (Bankr. S.D. Ind. 2013).

9 Arrowood Indem. Co. v. City of Warren, Mich., 54 F. Supp. 3d 723 (E.D. Mich. 2014).

10 Arrowood Indem. Co. v. City of Warren, Mich., 54 F. Supp. 3d 723 (E.D. Mich. 2014).

11 Arrowood Indem. Co. v. City of Warren, Mich., 54 F. Supp. 3d 723 (E.D. Mich. 2014).

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II. Judges

E. Disqualification and Recusal of Judges

2. Grounds for Disqualification

d. Interest of Judge or Judge's Relative in Case

(1) In General

§ 92. Federal judge's interest that could be substantially affected by outcome of proceeding; judge party to proceeding as basis for disqualification

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 42, 45

A.L.R. Library

Disqualification of judge under 28 U.S.C.A. s 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding, 163 A.L.R. Fed. 575

Forms

Forms relating to disqualifying judge, generally, see Federal Procedural Forms, Actions in District Court; Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw® Search Query]

Aside from financial interest in a case,[1] a judge must disqualify him or herself if the judge knows that he or she has any other

interest that could be substantially affected by the outcome of the proceeding,[2] or if the judge is a party to the proceeding.[3] The term "any other interest that could be substantially affected" means an interest in the subject matter of the litigation or a party to it.[4] An interest which a judge has in common with many others in a public matter is not sufficient to disqualify the judge.[5]

A judge is usually required to disqualify him or herself automatically if the judge is named as a party in a case,[6] although the judge need not disqualify him or herself if he or she is a party in another case,[7] has been sued by a party in prior lawsuits,[8] or if a party attempts or threatens to initiate separate proceedings against the judge[9] or other judges in the district.[10] A judge who is named as a defendant in a plaintiff's amended complaint is not required to disqualify him or herself unless there is a legitimate basis for suing the judge.[11]

Footnotes

1 As to disqualification of judge on basis of financial interest, see §§ 94 to 97.

2 28 U.S.C.A. § 455(b)(4).

3 28 U.S.C.A. § 455(b)(5)(i).
As to divestiture of interest, see § 93.

4 In re Drexel Burnham Lambert Inc., 861 F.2d 1307 (2d Cir. 1988).

5 U.S. v. State of Ala., 828 F.2d 1532, 41 Ed. Law Rep. 871 (11th Cir. 1987).

6 U.S. v. Corrigan, 401 F. Supp. 795 (D. Wyo. 1975), judgment rev'd on other grounds, 548 F.2d 879 (10th Cir. 1977).

7 Coltrane v. Templeton, 106 F. 370 (C.C.A. 4th Cir. 1901).
The fact that the district court judge was a defendant in the litigant's severed civil rights action did not require the judge's recusal in the litigant's separate habeas action. In re Noble, 663 Fed. Appx. 188 (3d Cir. 2016).

8 Stine v. Oliver, 644 Fed. Appx. 857 (10th Cir. 2016).

9 U.S. v. Grismore, 564 F.2d 929 (10th Cir. 1977).

10 In re O'Dwyer, 611 Fed. Appx. 195 (5th Cir. 2015).

11 Andersen v. Roszkowski, 681 F. Supp. 1284 (N.D. Ill. 1988), judgment aff'd, 894 F.2d 1338 (7th Cir. 1990).